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CASES

ON

THE LAW OF BILLS AND NOTES

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

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BY

HOWARD L. SMITH

PROFESSOR OF LAW IN THE UNIVERSITY OF WISCONSIN

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AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

ST. PAUL

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THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

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the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., December, 1910.

Following are the books of the Series now published, or in press:

Administrative Law
Bills and Notes
Carriers
Conflict of Laws
Criminal Law
Criminal Procedure
Damages
Partnership
Persons
Suretyship
Trusts
Wills and Administration

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CASES ON BILLS AND NOTES

INTRODUCTION

NEGOTIABILITY

SHEPPARD'S TOUCHSTONE, 240.

Things in action, and things of that nature as causes of suit, rights and titles of entry are not grantable over to strangers but in special cases. * * *

If a man owe me money on an obligation, or the like, I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it, or I may grant the writing itself to another and he may cancel it or give it to the obligor.

HAMMOND v. MESSENGER.

(High Court of Chancery, 1838. 9 Sim. 327.)

The plaintiff was the assignee, for valuable consideration, of a debt of £80., due, from the defendant Charles Messenger, to the defendants William Wilks and Henry Thomas Wooler, who had been copartners as coal merchants.[1]

SHADWELL, V. C. If this case were stripped of all special circumstances, it would be, simply, a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed, against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if

[1] The statement of the case is abridged, and the arguments and part of the opinion are omitted.

the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor.

If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances.

The only question then is whether, on this record, there are any special circumstances which create a ground for a Court of Equity to entertain the bill against the debtor.

The bill sets out with a statement that a partnership was carried on between Wilks & Wooler; and a variety of instruments and transactions are stated, the result of which was, that the partnership was to be dissolved, that the plaintiff was to pay the debts due from the partnership, and to be entitled to the partnership assets. Then it represents that Messenger, the demurring party, at the time of the agreement for the dissolution of the partnership, was justly indebted, to the firm, in the sum of £80. for coal and coke sold and delivered to him by the firm, and that Messenger is now indebted to the plaintiff in the said sum of £80. as the assignee of such debt. Therefore the debt in question was, purely, a debt recoverable at law. Then the bill states a notice given to Messenger by the plaintiff to pay the debt to him. It then states that on the 2d of October, the plaintiff called on Messenger, and applied to him for payment of the sum of £80., and fully apprised him of the plaintiff's right and title to demand and receive payment of it from him; that Messenger, for the first time, pretended that the plaintiff was not entitled to receive the debt, but that he was bound to pay it to Wilks & Wooler. That, of itself, creates no equitable ground.

The bill then alleges, in the usual manner, that the plaintiff had applied to Messenger for the payment of the debt, and that Messenger, combining and confederating with Wilks, had refused so to do, and pretended that there was no such debt; that, however, gives no equity. Then it charges that Messenger, on receiving notice of the plaintiff's right and title to the debt, became and still was a trustee of it for the plaintiff. That again does not make him a trustee, that is to say, such a trustee as the plaintiff has a right to sue in equity, unless the whole circumstances of the case taken together, do show that the plaintiff has a right to sue in equity. * * *

When I come to the prayer, I find that it, first of all, prays: "That Messenger may be decreed to pay to the plaintiff the sum of £80. so due to the firm of Wilks & Wooler as aforesaid, or, if necessary, that an account may be taken." Now no case, whatever, is stated to show the necessity for an account, and, therefore, it must, of necessity, stand as a mere prayer that Messenger may be decreed to pay the debt. It then proceeds as follows: "Or that the plaintiff may be at liberty to use the name of the defendants, Wilks & Wooler,

in an action at law to be brought by him against Messenger." There is, however, no case stated which shows that Wilks & Wooler have at all interfered to prevent, or that they intend to prevent the plaintiff from using their names at law. Then it goes on thus: "And that Messenger may be restrained from pleading, to such action, any plea or pleas of payment or satisfaction of such debt of £80. to Wilks & Wooler, or in any manner availing himself thereof." I do not understand what is meant by this part of the prayer; because the bill nowhere states that there has been a fictitious payment or satisfaction, of which Messenger intends to avail himself at law. Why then does it ask that Messenger may be restrained from pleading any plea or pleas of payment or satisfaction of the debt to Wilks & Wooler, or in any manner availing himself thereof.

It seems to me that this case is altogether denuded of those special circumstances, the existence of which is the only ground for this court to lend its aid to a party who, like the plaintiff, has taken an assignment of a debt; and, consequently, the demurrer must be allowed.

Demurrer allowed, with liberty to the plaintiff to amend his bill.

BARROW v. BISPHAM.

(Supreme Court of New Jersey, 1829. 11 N. J. Law, 110.)

FORD, J.[2] The defendant moves to set aside a judgment entered against him in this case, on bond and warrant of attorney, upon an allegation that the bond was obtained from him by fraud, and for a consideration that has failed. The bond and warrant were given originally to Benjamin McGinnis, and assigned by him to James Barrow, the plaintiff. * * *

The counsel for the plaintiff insists that no fraud between the original parties can be set up against James Barrow, the assignee, who became a bona fide holder, without notice, for valuable consideration, and against whom no fraud is proved or imputed. In support of this doctrine, he cites Somes v. Brewer, 2 Pick. (Mass.) 184, 13 Am. Dec. 406, Fletcher v. Peck, 6 Cranch, 133, 3 L. Ed. 162, and Parker v. Patrick, 5 Term R. 175. The two former cases, instead of relating to bonds, or to a chose in action, refer exclusively to transfers of real estate. If one obtain a deed for land by fraud and imposition on the owner, and afterwards convey the same to a purchaser, having no notice of the fraud, such purchaser will hold against the original owner. The reason of those cases is that the title to land, which passes by solemn livery of seisin or conveyances amounting to it, would be universally endangered, if fraud might

[2] Only a portion of the opinion is printed.

be set up in any remote link of a long chain of title (or succession of owners), through whom it had passed in coming to the last purchaser. The cases have nothing to do with the assignment of a chose in action, which is governed by widely different rules. The case of Parker v. Patrick, only shows that goods, taken by a pawnbroker in the way of his trade, in market overt, and for valuable consideration, cannot be recovered back by the former owner; from whom they were not stolen, but obtained by false pretences. By the common law goods are assignable, but bonds are not; and all reasoning from one to the other is necessarily fallacious. The law touching the assignment of bonds, and the rights of an assignee, is settled by a multitude of cases. Thus in 1 Eq. Ca. Ab. 44, pl. 4, it is laid down, that an assignee of a bond must take it subject to the same equity that it is in the hands of the obligee. In Davis v. Austin, 1 Ves. Jr. 247, the Lord Chancellor says: "A purchaser of a chose in action must always abide by the case of the person from whom he buys, that I take to be an universal rule." In Wheeler v. Hughes, 1 Dall. 23, 1 L. Ed. 20, the court says the assignee of a bond takes it at his own peril, and stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee at the time of the assignment or notice of it. Rundle v. Ettwein, 2 Yeates (Pa.) 23, is to the same effect. So in Clute v. Robison, 2 Johns. (N. Y.) 595. Clute gave a bond for $1,200 to Rawlins, and took back a separate agreement that the bond should be surrendered up on his performing certain conditions. Rawlins assigned the bond to Robison. Kent, Chancellor, said: "There can be no doubt that Robison took his assignment subject to all equities which attached to it in the hands of Rawlins." Our statute, Rev. Laws, 305, making bonds assignable and enabling assignees to sue in their own names, instead of shaking this doctrine, serves to confirm it; it allows all just set-offs and discounts prior to the assignment. In the case of Garretsie v. Van Ness, 2 N. J. Law, 23, 2 Am. Dec. 333, this court decided that the assignment of a bond transferred no more interest than the assignor had in it at the time. Hence it appears that every defence is open against James Barrow the assignee, that the defendant could have had against Benjamin McGinnis. * * *

ROWLEY v. BIGELOW.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1832. 12 Pick. 307, 23 Am. Dec. 607.)

Trover for 627 bushels of corn. The plaintiffs proved that they were the owners of the corn on the 24th of May, 1830, and had it in their possession in New York; that one Martin, living there, pretending to purchase it for cash, obtained possession thereof and

shipped it on board the Lion on the 25th of May, consigned to the defendants in Boston; that on the 26th Dunning, one of the plaintiffs, demanded payment of Martin, but not receiving payment, proceeded to Boston, where he arrived before the Lion, and notified the defendants that Martin had obtained the corn fraudulently; that on the 30th, on the arrival of the Lion at Boston, Dunning boarded her, demanded the corn of the master, who, notwithstanding, delivered it to the defendants; that Dunning demanded the corn of them, offering to pay the freight or charges, but that they refused to deliver it. To prove Martin's fraudulent intent, the plaintiffs were allowed, against the objection of the defendants, to give in evidence the depositions of merchants in New York, that Martin had made purchases of them about the same time, under circumstances tending to show that he was insolvent and that he knew it, and had no reasonable expectation of paying for the merchandise.

The defendants, in support of their title, produced a bill of lading, dated May 17, 1830, signed by the master of the Lion, for 2,000 bushels of corn shipped by Martin and consigned to the defendants. They also produced invoices to correspond, and a letter of even date, to which the bill of lading and invoices were annexed, stating that Martin had drawn on the defendants for $1,000. They further proved that such a bill drawn on them had been accepted by them on the 20th, and had been paid at maturity. The defendants received the bill of lading and invoice and accepted the draft in the regular course of business.

The court ruled in favor of the defendants, to which ruling the plaintiffs excepted. Verdict for the defendants by consent, subject to the opinion of the court.[3]

SHAW, C. J. * * *

2. It is next contended, on the part of the plaintiffs, that no property passed, by the fraudulent purchase of Martin, from the plaintiffs to him, so as to enable him to make a title to the defendants.

The evidence clearly shows that there was a contract of sale and an actual delivery of the goods, by their being placed on board a vessel, pursuant to his order; and this delivery was unconditional, unless there was an implied condition arising from the usage of the trade that the delivery was to be considered revocable, unless the corn should be paid for, pursuant to the contract and to such usage. This contract and delivery were sufficient in law to vest the property in Martin and make a good title, if not tainted by fraud. But being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods, or affirm it

[3] The statement of the case is abridged, and a portion of the opinion omitted.

and claim the price. And cases may be imagined where the vendor, notwithstanding such fraud practiced on him, might, in consequence of obtaining security, by attachment or otherwise, prefer to affirm the sale. The consequence therefore is that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the law allows him to avoid it.

The difference between the case of property thus obtained and property obtained by felony, is obvious. In the latter case no right either of property or possession is acquired, and the felon can convey none.

We take the rule to be well settled that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a bona fide purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud. Parker v. Patrick, 5 Term R. 175. The same rule holds in regard to real estate. Somes v. Brewer, 2 Pick. 184, 13 Am. Dec. 406. * * *

Judgment on the verdict.

MILLER v. FINLEY.

(Supreme Court of Michigan, 1872. 26 Mich. 249, 12 Am. Rep. 306.)

CAMPBELL, J.[4] Miller sued below upon a joint and several promissory note. Both defendants pleaded the general issue, and Hugh Finley, jr., appended to his plea an affidavit denying the execution of the note by himself. No notice of any kind was filed or served with the plea.

Upon the trial the defense was rested upon several grounds. It was claimed that Hugh Finley, sr., signed the note without the consent of Hugh Finley, jr., his son, who, it was alleged, refused to assent to having him sign, and after the note had been delivered as the sole note of the son. It was further claimed that when he signed

[4] A portion of the opinion is omitted.

it he was in such a state of drunkenness, procured by the original payee, that he was not responsible for his acts. It was also set up that the note was one of several obtained by fraud, as the price of a worthless patent, for a horse-collar fastener.

Miller claimed as a bona fide holder. Judgment was rendered for defendants below, and he now brings error. * * *

The testimony of defendants tended to prove that the elder Finley knew nothing of the trade, and was drunk when he signed the note, and that the payee had wholly, or in part, procured it. The testimony for plaintiff tended to show that the old man was fully aware of the transaction between his son and the payee, and took some part in it. The evidence of the son does not indicate any extreme intoxication on the part of the father. His own testimony goes further. He seems, however, to have recollected the signing, and its genuineness is not in issue. There is no question in the case as to the identity of the paper. The note he signed was the one the son supposed he was signing, and there was no substitution of one paper for another. The defense rests upon the ground of fraud, and not of illegality, and while, if the old man's story is true, the note would be voidable as against the payee, it would not be a nullity as to all persons.

There is nothing on the face of the paper to cast suspicion upon its character, and it can only be impeached, in the hands of a holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith. Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Goodman v. Harvey, 4 Ad. & El. 870; Uther v. Rich, 10 Ad. & El. 784; 2 Parsons on Bills, 280; Redfield & Bigelow's Leading Cases on Bills and Notes, 239, 257.

The proof must show that the holder for value, who takes a note with no earmarks of fraud or illegality, has had notice of such a nature that he could not honestly take the paper without further inquiry. The facts, of which he must have either knowledge or notice, must be such as go to the defects of title. The defects set up here were the fraud alleged to have been practiced on the elder Finley, by taking advantage of his drunkenness, and the cheat, if there was any, whereby the younger Finley was induced to purchase the patent. The latter we have intimated was not properly in the case. But, if it had been admissible, it would, perhaps, be of no special importance, as presented by the record as it stands. We have found nothing in the testimony tending to show that Miller had heard or known anything about either of these defenses. * * *

Judgment reversed.

DAME v. BALDWIN.

(Supreme Judicial Court of Massachusetts, Suffolk, 1812, 8 Mass. 518.)

This was a writ of replevin for 40 firkins of butter, which had been attached by the defendant, a deputy sheriff of this county, as the property of Daniel Cook, of Corinth, in the state of Vermont, at the suit of Robert M. Barnard, of Charlestown, in the county of Middlesex.

The cause was tried at the last November term in this county, before Parker, J., from whose report the following facts appear:

These firkins of butter were the property of the said Cook in November, 1810, and he being desirous to transport them to Mr. Barnard, with whom he had had dealings, caused them to be branded with his name, and agreed with one Harlow to carry them to Charlestown, giving him written directions to deliver them to Barnard at the office for the inspection of butter. Harlow proceeded 10 miles on the road, and then engaged one Barron to take the butter on, and delivered it to him for that purpose, giving him the written directions he had received from Cook. This was done without the knowledge of Cook. Barron employed one Brown to carry the butter, giving him the written instructions aforesaid, which he repeatedly read to him, and also furnishing him with some money to bear his expenses: Cook being ignorant also of Brown's being employed. Brown sold two firkins of the butter on the way, to pay his traveling expenses, as he said.

When Brown arrived in Boston with his load, not having carried it to the inspection office, nor having given any notice to Barnard, he went to the square in Boston, which is the usual and established market place, and where great quantities of butter and other articles of country produce are sold, and there went to the store of the plaintiff, and offered the butter for sale, assuming the name of Cook, and claiming to sell the butter as his own. Dame agreed to take it according to the inspection, and it was carried to the inspection office in Boston, and Brown, under the name of Cook, returned to the store of Dame with the certificate of inspection, and Dame there paid him in bank bills the price of the butter, being $231.27, taking a bill of parcels therefor, which Brown signed with his mark, the name of D. Cook being added to the mark by some person in the store.

The defense was put upon three points: * * *

(3) That there was no authority in Brown to sell, and so no transfer of the property, which therefore remained in Cook, until the attachment made by the defendant. But the judge instructed the jury that the trust given by Cook to Harlow, and so down to Brown, to transport the butter to Charlestown, although violated by Brown, would not authorize Cook to reclaim the property from a bona fide innocent purchaser for a valuable consideration; the sale being of

an article commonly found in the market for sale, the carriers of such articles generally having authority to sell, and the property being exposed in the usual manner for the sale of such an article.

The jury returned a verdict for the plaintiff; and, a new trial being moved for by the defendant, the action stood over to this term on the motion.[5]

Per Curiam. It is beyond a question that the taking by Brown was felonious, and therefore a sale by him could not transfer the property. We have no markets overt in this commonwealth. The verdict must be set aside and a new trial granted.

MILLER v. RACE.

(Court of King's Bench, 1758. 1 Burrows, 452.)

It was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord Mansfield, at the sittings in Trinity term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty at Chipping-Norton in Oxfordshire; that on the same night, the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them, as cash, and that in the usual way of negotiating bank-notes they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title than what arises from the possession. It appeared, that Mr. Finney, having notice of this robbery, on the 13th of December, applied to the Bank of England "to stop the payment of this note;" which was ordered accordingly, upon Mr Finney's entering into proper security "to indemnify the Bank."

Some little time after this, the plaintiff applied to the Bank for the payment of this note; and, for that purpose, delivered the note to the defendant, who is a clerk in the Bank; but the defendant re-

[5] The statement of the case is abridged, and the arguments of counsel are omitted.

fused either to pay the note, or to redeliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of £21. 10s. damages; subject nevertheless to the opinion of this court upon this question—"Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action?" [6]

Lord MANSFIELD now delivered the resolution of the court.

After stating the case at large, he declared, that at the trial, he had no sort of doubt, but that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences, to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.

Now, they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money, as guineas themselves are; or any other current coin, that is used in common payments, as money or cash. * * *

It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark:" but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it; after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but before money has passed in currency, an action may be brought for the money itself. There was a case in 1 Geo. I, at the sittings, Thomas v. Whip, before Lord Macclesfield: which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord Macclesfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true; (and it is not at all denied:) but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes: for Anonymous, 1 Salk. 126. M. 10 Wm. III, at nisi prius, is in point. And Lord Chief Justice

[6] The arguments of counsel and a portion of the opinion are omitted.

Holt there says that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.)

Here an inn-keeper took it, bona fide, in his business from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for £1000. it might have been suspicious: but this was a small note, for £21. 10s. only: and money given in exchange for it. * * *

Rule that the postea be delivered to the plaintiff.

PEACOCK v. RHODES.

(Court of King's Bench, 1781. 2 Doug. 633.)

In an action upon an inland bill of exchange, which was tried before Willes, Justice, at the last Spring Assizes for Yorkshire, a verdict, by consent, was found for the plaintiff, subject to the opinion of the court on a special case, stating the following facts:

"The bill was drawn at Halifax, on the 9th of August, 1780, by the defendants, upon Smith, Payne & Smith, payable to William Ingham, or order, 31 days after date, for value received. It was indorsed by William Ingham, and was presented by the plaintiff for acceptance and payment, but both were refused, of which due notice was given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at Scarborough, received the bill from a man not known, who called himself William Brown, and, by that name, indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at Scarborough, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. William Ingham, to whom the bill was payable, indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher, received it from John Daltry; and it was stolen from Joseph Fisher, at York, (without any indorsement or transfer thereof by him,) along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of Ingham." [1]

[1] The arguments of counsel are omitted.

Lord MANSFIELD. I am glad this question was saved, not for any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps, in the single case, (which is a hard one, but has been determined,) of a note for money won at play. Vide Lowe v. Waller, T. 21 Geo. III, 2 Doug. 736. I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of mala fides was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and, therefore, the case is clear, and within the principle of all those Mr. Wood has cited, from that of Miller v. Race, 1 Burrows, 452, downwards, to that determined by me at nisi prius.

The postea to be delivered to the plaintiff.

PICKER v. LONDON & COUNTY BANKING CO., Limited.

(Court of Appeal, 1887. 18 Q. B. Div. 515.)

The action was brought by the plaintiff to recover possession from the defendants of certain Prussian consolidated 4½ per cent. bonds which the plaintiff alleged to belong to him. The defendants set up by their defense that these bonds were negotiable instruments of which they were bona fide holders for value.

Judgment for plaintiff.[8]

Lord ESHER, M. R. In this case the plaintiff brings his action of detinue to recover from the defendants certain Prussian bonds of which the defendants have possession. His case is that the bonds were stolen from him, that no title to the bonds passed to the thief, and that the defendants cannot therefore make a title to them. The defendants in answer say that, although the thief had no property in the bonds, yet the delivery of them to the defendants, who took them bona fide and for valuable consideration, passed the property

[8] The statement of facts is abbreviated, and arguments of counsel, part of the opinion of Lord Esher, M. R., and the concurring opinion of FRY, L. J., are omitted.

in them to the defendants, on the ground that they were what are known in English law and trade as negotiable instruments. This contention raises the question whether these bonds without the coupons were for this purpose negotiable instruments according to the law of England. * * *

I rather think that the evidence of the Prussian witnesses, whose business would make it likely that they should know the custom of trade in Prussia, tended to show that these bonds without the coupons were not negotiable instruments by the custom of trade there. But I will assume that they were negotiable instruments in Prussia in the fullest sense of the term. The question is, what under those circumstances is the English law with respect to them? The common law of England does not allow a party to a contract to transfer his right under the contract to another person except in certain cases. Such a transfer of a chose in action could of course be made under the provisions of a statute, and in the case of instruments which by the custom of merchants recognized by the law of England had become negotiable instruments. But it appears to me that in order to establish such an exception to the common-law rule some custom of merchants obtaining in this country must be proved or some English statute must be relied on. If all that can be proved is that by the law or custom in Prussia the instrument is negotiable, then, as it seems to me, the answer is that an English court and English merchants are not bound by a law or custom of trade in Prussia. To prove that an instrument is negotiable in the sense required, there must be something to make it so by English law. There is no question here of any statute; nor is it shown that there is any custom of merchants in this country to treat these bonds without the coupons as negotiable.

It is not necessary, I think, to decide in this case what would be prima facie evidence of such a custom. It was not disputed that the evidence in this case justified the learned judge in the court below in saying that there was nothing to show that by the custom of trade in England these bonds were negotiable, so as to be negotiable instruments in the full sense of the term. On the contrary the evidence was that they were not, for I understand the effect of the evidence of the plaintiff's witnesses not to be confined merely to the practice of the London Stock Exchange, but as referring to the practice among merchants and business men in general. If it were necessary to say what would be prima facie evidence of the negotiability of an instrument in this or in a foreign country, I should be disposed to say that evidence that an instrument is by the custom of trade negotiable here would be strong evidence that it is negotiable in the country of its issue, but that evidence that it is negotiable by the custom of trade in the country of issue would not be evidence that it is negotiable here. It seems to me that these considerations are sufficient to decide the case.

None of the cases cited, such as Goodwin v. Robarts, 1 App. Cas. 476, Lang v. Smyth, 7 Bing. 284, and Wookey v. Pole, 4 B. & A. 1, seem to contravene the view I have expressed, viz., that, to render a foreign instrument negotiable here in the full sense of the term, it is not sufficient to show that by the foreign law or custom it is treated as negotiable. On the contrary they all seem to me to support it.

For these reasons I think this appeal must be dismissed.

Bowen, L. J. I am of the same opinion. These bonds having been the property of the plaintiff before they were stolen from him, the question is whether the defendants have nevertheless a good title to them, having taken them bona fide and for valuable consideration. The broad principle of law is that except in the case of a sale in market overt no person can acquire a title to a personal chattel from a person who is not the owner. There is an exception to this principle in respect of certain instruments of contract well known to the law merchant, in the case of which, by the recognized custom of merchants, the property in the instrument and all rights upon it pass by the delivery of the instrument. A further exception to the rule would be where an instrument, though not possessing the quality of negotiability at common law or by any custom of merchants, has that quality attached to it by some statute of the realm. Among the rights which are ordinarily created by such instruments is the right of suing upon the contract therein contained. At common law in general a chose in action is not transferable. Therefore the right of action can only pass by delivery of the instrument where the instrument is negotiable or clothed by statute with the attributes of a negotiable instrument.

It may be said that in the case of these bonds there is not, strictly speaking, a chose in action, because the bonds only import a promise by a foreign government which could not be sued on; but it is sufficient for the present purpose to say that, in my opinion, the case for the defendants cannot be put higher than if the promise which the bond imports were one on which there was a right of action. The question then would be whether this right could be passed at law so far as English law is concerned, otherwise than by virtue of some statute or some custom of merchants prevailing in this country. I do not see in this case any evidence that these bonds are negotiable by any custom of merchants in this country; there is no evidence whatever of any mercantile custom whereby such instruments as these bonds without the coupons are treated as part of the mercantile currency recognized in the kingdom, unless the evidence with regard to their negotiability in Prussia could be treated as amounting to such evidence. But at the utmost that would only amount, as it seems to me, to evidence that such instruments form part of the mercantile currency in Prussia. I do not say that the evidence does amount even to that, but I will assume for a moment that it does. Then is evidence that an instrument or piece of

money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency in this country? Such a proposition is obviously absurd, for, if it were true, there could be no such thing as a national currency. For the same reason, as it appears to me, that a German dollar is not the same thing as its equivalent in English money for this purpose, and that the barbarous tokens of some savage tribe, such as cowries, are not part of the English currency, evidence that the instrument would pass in Prussia as a negotiable instrument does not show that it is a negotiable instrument here. For these reasons it appears to me that the defense fails.

FRY, L. J. I am of the same opinion. * * *

Appeal dismissed.

SHAW v. NORTH PENNSYLVANIA R. CO.

(Supreme Court of the United States, 1879. 101 U. S. 557, 25 L. Ed. 892.)

This is an action of replevin, brought by the Merchants' National Bank of St. Louis, Mo., against Shaw & Esrey, of Philadelphia, Pa., to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof, having been taken possession of by the marshal, were returned to the defendants upon their entering into the proper bond. On November 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Bro., of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for 170 bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Bro. by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft—the original bill of lading still being attached thereto—to Kuhn & Bro. by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Bro. indorsed the original bill of lading to Miller & Bro., and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Bro. to the defendants, who were manufacturers at Chester, Pa. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Bro. and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word, that Miller & Bro. had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Bro. had fraudulently got possession of the bill.

Verdict for the plaintiff. The defendants, Shaw and Esrey, sued out this writ of error.[9]

Mr. Justice STRONG delivered the opinion of the court.

The defendants below, now plaintiffs in error, bought the cotton from Miller & Bro. by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence they can have no other or better title than their vendors had. The inquiry, therefore, is, what title had Miller & Bro. as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Bro.? The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Bro., and by them indorsed over to Miller & Bro. for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Bro. knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Bro. were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Bro., by taking the bill of lading from Kuhn & Bro. under these circumstances, acquired thereby a good title to the cotton as against the bank. In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Bro. is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both states enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania

[9] The statement of the case is abridged, and the arguments of counsel and part of the opinion are omitted.

declares simply, they "shall be negotiable, and may be transferred by indorsement and delivery"; while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; i. e. by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is "negotiability"? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange, and afterwards promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a bona fide holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee had the bill or note remained in his hands. So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner. It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instruments in favor of bona fide holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it, that is, nothing short of mala fides, will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Adol. & E. 870; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Matthews v. Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (Miller v. Race, 1 Burrows, 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in Peacock v. Rhodes, 2 Doug. 633, to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by

the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be therefore that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice of nondelivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words than can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it. * * *

Judgment affirmed.

PART I

FORM AND INCEPTION

CHAPTER I

FORM OF BILL AND OF NOTE

SECTION 1.—NEGOTIABLE AND NONNEGOTIABLE BILLS AND NOTES—WORDS OF NEGOTIABILITY

HODGES v. STEWARD.

(Court of King's Bench, 1691. 1 Salk. 125.)

In an action on the case on an inland bill of exchange brought by the indorsee against the drawer, these following points were resolved:

1st. A difference was taken between a bill payable to J. S. or bearer, and J. S. or order; for a bill payable to J. S. or bearer is not assignable by the contract so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise. But when the bill is payable to J. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action.

2dly. Though an assignment of a bill payable to J. S. or bearer be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the indorser and indorsee, and the indorser is liable to an action for the money; for the indorsement is in nature of a new bill.

3dly. It being objected, that in this case there was no averment of the defendant's being a merchant, it was answered by the court, that the drawing the bill was a sufficient merchandizing and negotiating to this purpose.

4thly. The plaintiff declared on a special custom in London for the bearer to have this action. To which the defendant demurred, without traversing the custom; so that he confessed it, whereas in truth

there was no such custom; and the court was of opinion, that for this reason judgment should be given for the plaintiff; for though the court is to take notice of the law of merchants as part of the law of England, yet they cannot take notice of the custom of particular places; and the custom in the declaration being sufficient to maintain the action, and that being confessed, he had admitted judgment against himself.

5thly. It was held that a general indebitatus assumpsit will not lie on a bill of exchange for want of a consideration, for it is but an evidence of a promise to pay, which is but a nudum pactum; and therefore he must either bring a special action on the custom of merchants, or else a general indebitatus against the drawer for money received to his use.

Judgment pro quer.

Nota.—If a promissory note be made to J. S. and bearer, the bearer cannot bring an action on this note in his own name, but he may in the name of the principal; and the bare possession of the note is, for that purpose, a sufficient authority. Nicholson v. Sedgwick, Hil. 1696, 7 C. B. This nota is copied from a MSS. rep. of Judge Blencowe. 1 Ld. Raym. 180, S. C.

CLERKE v. MARTIN.

(Court of Queen's Bench, 1702. 2 Ld. Raym. 757.)

The plaintiff brought an action upon his case against the defendant upon several promises; one count was upon a general indebitatus assumpsit for money lent to the defendant; another count was upon the custom of merchants, as upon a bill of exchange; and showed, that the defendant gave a note subscribed by himself, by which he promised to pay ——— to the plaintiff or his order. Upon non assumpsit a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and therefore the plaintiff, having declared upon it as such, was wrong; but that the proper way in such cases is to declare upon a general indebitatus assumpsit for money lent, and the note would be good evidence of it.

But it was argued by Sir Bartholomew Shower the last Michalemas term for the plaintiff, that this note, being payable to the plaintiff or his order, was a bill of exchange, inasmuch as by its nature it was negotiable; and that distinguishes it from a note payable to F. S. or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently not negotiable, and therefore it cannot be a bill of ex-

change, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to F. N. F. N. might have brought his action upon it as upon a bill of exchange, and might have declared upon the custom of merchants. Why then should it not be before such indorsement a bill of exchange to the plaintiff himself; since the defendant by his subscription has shown his intent, to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed, that it shall be assignable over, which is by consequence that it shall be a bill of exchange? That there is no difference in reason, between a note, which saith, "I promise to pay to F. S. or order," etc., and a note which saith, "I pray you to pay to F. S. or order," etc., they are both equally negotiable; and to make such a note a bill of exchange, can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant (Sarsfield v. Witherly, 2 Vent. 292), and has given his consent, that his note shall be negotiated, and thereby has subjected himself to the law of merchants.

But HOLT, Chief Justice, was totis viribus against the action; and said, that this note could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty unknown to the common law, and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general indebitatus assumpsit for money lent, etc. As to the case of Sarsfield v. Witherly, he said, he was not satisfied with the judgment of the King's Bench, and that he advised the bringing of a writ of error.

GOULD, Justice, said, that he did not remember, it had ever been adjudged, that a note, in which the subscriber promised to pay, etc., to F. S. or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt; and so it was resolved between Horton and Coggs, now printed in 3 Lev. 299, but that it was never resolved, that the party himself (to whom such note was payable) could not have an action upon the custom of merchants upon such a bill.

But HOLT, Chief Justice, answered, that it was held in the said case of Horton v. Coggs, that such a note was not a bill of exchange within the customs of merchants.

And afterwards in this Easter term it was moved again, and the court continued to be of opinion against the action. And then Mr. Branthwaite for the plaintiff urged, that if this note was not a bill of exchange within the custom of merchants, then the promise found-

ed upon it was void; and then it could not be intended, that any damage was given by the jury for the breach of it, but all the damages must be intended to have been given upon the general indebitatus assumpsit.

HOLT, Chief Justice, said, that would be true, if it had been void by reason of its being insensible; but this matter is sensible enough, though not sufficient in law to raise a promise; and therefore one cannot intend, but that damages were given for it; and consequently that judgment must be arrested.

And judgment was given, quod querens nil capiat per billam, etc. by the opinion of the whole court.

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3 & 4 ANNE, c. IX, § 1 (1704).

Whereas it hath been held, That notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsible over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: therefore to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner; be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all notes in writing, that after the first day of May, in the year of our Lord, one thousand seven hundred and five, shall be made and signed by any person or persons, body politick or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politick and corporate, his, her, or their servant or agent, as aforesaid doth or shall promise to pay to any other person or persons, body politick and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politick and corporate, to whom the same is made payable; and also every such note payable to any person or persons, body politick and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills

of exchange are or may be, according to the custom of merchants; and that the person or persons, body politick and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do, upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politick and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politick and corporate, to whom such note that is payable to any person or persons, body politick and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politick and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange: and in every such action the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and if such plaintiff or plaintiffs shall be nonsuited, or a verdict be given against him, her, or them, the defendant or defendants shall recover his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants, respectively recovering, may sue out execution for such damages and costs by capias, fieri facias, or elegit.

GRANT v. VAUGHAN.

(Court of King's Bench, 1764. 3 Burrows, 1516.)

Upon shewing cause why a verdict which had been given for the defendant should not be set aside (upon payment of costs,) and a new trial granted,—the case appeared to be this—

The defendant Vaughan, a merchant in London, gave a cash-note upon his banker, to one Bicknell, a husband of a ship of his: which note was dated "London 22d October 1763," and directed to Sir Charles Asgill, who was Vaughan's banker; and was worded thus—"Pay to Ship Fortune, or bearer," so much. Bicknell, by some accident, lost this note. The person who found it, or who at least was in possession of it (however he might obtain that possession), came, four days after the note was payable in London, to the shop of Grant the plaintiff, who was a tradesman at Portsmouth, and bought five pounds worth of tea of him, and gave him this note in payment, desiring to have the change out of it. Grant (the plaintiff) stept out, to make inquiry "who this Vaughan might be:" And upon being informed "That he was a very good man, and that it was his handwriting," he readily gave the change out of the note, retaining the price of the tea. Vaughan, upon being apprized that Bicknell had

lost the note, sent notice to Sir Charles Asgill, "Not to pay it." Whereupon Grant, being refused payment, brought his action upon the case against Vaughan, and inserted two counts in his declaration; one, upon an inland bill of exchange; the other, an indebitatus assumpsit for money had and received to his use. The cause was tried by a special jury of merchants; who found for the defendant.[1]

Lord MANSFIELD said the case of Nicholson and Sedgwick, 1 Ld. Raym. 180, was urged by the defendant's counsel at the trial: and, not being apprized of the point in question, till it came on to be tried before him, he was not fully aware of the cases which differed from it. And yet he was struck, he said, very strongly that, upon general principles that case was not agreeable to law and justice: and he then thought that the reasons, upon which that case and the other authorities relied upon by the counsel for the defendant at the trial, were grounded, were insufficient ones.

That "of the goldsmith's having perhaps paid the money to the original payee himself, before notice from the bearer," can never hold: it cannot happen, in the course of business, that the money should be paid to the nominee, before notice from the bearer.

Nor was any satisfactory reason given, why an action might not be brought in the bearer's own name. The reason alledged, "That then any person who finds the note accidentally, may bring an action and recover," is insufficient; because the plaintiff in such action must prove that he came by it bona fide and upon a valuable consideration.

As to the necessity of bringing the action in the name of the person to whom the note was originally made payable;—it was impossible in the present case; because there was no person originally named as the payee: it runs "Pay to ship Fortune, or bearer." However, if there had been a person named, the reason would not hold: for the person so originally named may become bankrupt; or may be indebted to the drawer of the note; so as to give the drawer a right to set off such debt against the demand of the money due upon the note. So that if the courts of law should not allow the bearer to bring the action in his own name, there might be no relief at all. And it can never be supposed reasonable or legal, that the banker should have it left in his discretion or choice, to pay the money to one or the other as his fancy or inclination should lead him.

These thoughts occurred to me at the trial: and therefore I chose to take the opinion of the court.

I left two things to the consideration of the jury. The first was, "Whether the plaintiff came to the possession of this note fairly and bona fide:" (which necessarily includes his not having notice of it's being a lost note.) The second was, "Whether such draughts as this

[1] Arguments of counsel and the concurring opinions of WILMOT and YATES, JJ., are omitted.

is, were, in the course of trade, dealing and business, actually paid away and negotiated, or in fact and practice negotiable:" and I then considered this, as leaving a plain fact to them, upon which they could have no doubt.

But I am now clearly of opinion, that I ought not to have left the latter point to them: for it is a question of law, "Whether a bill or note be negotiable, or not."

It appears in the books, "That these notes are, by law, negotiable." And the plaintiff's maintaining his action, or not maintaining it, depends upon the question "Whether such a note is negotiable, or not."

It appears likewise, "That the bearer of them may maintain an action as bearer, where he can intitle himself to them on a valuable consideration."

Hinton's Case, in 2 Show. 235, is this—"Case on a bill of exchange, against the drawer, (bill not being paid) and payable to J. S. or to the bearer. The plaintiff brings the action, as bearer. And, upon evidence, ruled by the Lord Pemberton, that he must intitle himself to it on a valuable consideration, (though among bankers they never make indorsements in such case:) for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." (And it would be absurd, to indorse such bills as are made payable to bearer.)

Crawley v. Crowther, 2 Freem. 257, Tr. 1702, in Chancery—"If a bill be payable to A. or bearer, it is like so much money paid to whomsoever the note is given; that, let what accounts or conditions soever be between the party who gives the note and A. to whom it is given, yet it shall never affect the bearer; but he shall have his whole money." So that the whole interest is transferred to the bearer.

1 Salk. 126, pl. 5, anonymous, M. 10 Wm. III., coram Holt, Ch. J., at nisi prius at Guildhall. "A bank-bill payable to A. or bearer, being given to A. and lost, was found by a stranger, who transferred it to C. for a valuable consideration: C. got a new bill in his own name. Per Holt, Ch. J. A. may have trover against the stranger who found the bill; for, he had no title, (though the payment to him would have indemnified the bank:) but A. can not maintain trover against C. by reason of the course of trade; which creates a property in the assignee or bearer." It is negotiable by delivery.

Miller v. Race, H. 31 Geo. II., 1 Burrows, 452. The holder of a bank-note recovered against the cashier of the bank, though the mail had been robbed of it, and payment was stopt; it appearing, that he came by it fairly and bona fide and upon a valuable consideration. And there is no distinction between a bank-note and such a note as this is.

The act of 3 & 4 Anne, c. 9, puts promissory notes upon the same foot, throughout, with inland bills of exchange. And therefore whatever is the rule as to inland bills of exchange payable to bearer, must be so likewise as to notes payable to bearer.

In a case between Walmesley v. Child, 11th December, 1749, in chancery, where one of Mr. Child's notes, payable to bearer, was lost or stolen, and payment stopt by the true owner, who demanded that it should be paid to him; Mr. Child refused to pay it, without surety against the demands of a future bearer. The true owner brought his bill. Lord Hardwicke dismissed the bill, unless the true owner would find such security. And he went upon the principle, that no dispute ought to be made with the bearer of a cash-note, who comes fairly by it; for the sake of commerce, to which the discrediting such notes might be very detrimental.

Upon looking into the reports of the cases on this head, in the times of King William the Third and Queen Anne, it is difficult to discover by them, when the question arises upon a bill, and when upon a note: for the reporters do not express themselves, with sufficient precision, but use the words "Note" and "Bill" promiscuously. It appears, however, that there were different opinions about the manner of declaring upon them: Lord Chief Justice Holt got into a dispute with the city about it. He was of opinion, that the plaintiff could not declare as upon a specialty, (where the consideration could not be disputed:) but he all along agreed, that the plaintiff might declare upon an indebitatus assumpsit. The objection was, to bringing an action upon the note itself, as upon a specialty: but I do not find it any where disputed, that an action upon an indebitatus assumpsit generally, for money lent, might be brought on a note payable to one or order.

Great force arises from the act of Parliament of 3 & 4 Anne putting notes merely upon the foot of inland bills of exchange, and particularly specifying notes payable to bearer.

But upon the second count, the present case is quite clear, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use, may be brought by the bona fide bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it: and if so, it is for the use of the person who has the note as bearer. In this case, Bicknell himself might undoubtedly have brought this action. He lost it: and it came bona fide and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. Bicknell and the plaintiff are both innocent. The law must determine which of them is to stand to the loss. And, by law, it falls upon Bicknell.

There ought to be a new trial. * * *

Rule absolute for a new trial.[2]

[2] A note payable "to the bearer, A.," is not negotiable. Bloomingdale v. Bank, 33 Misc. Rep. 594, 68 N. Y. Supp. 35 (1901); Warren v. Scott, 32 Iowa, 22 (1871). But an instrument payable to "A., or bearer," is negotiable. Bitzer v. Wagar, 83 Mich. 223, 47 N. W. 210 (1890).

SMITH v. KENDALL.

(Court of King's Bench, 1794. 6 Term R. 123.)

Assumpsit for money paid by the plaintiff to the use of the testator, money lent to him, and on an account stated with the testator and another with the executor. The defendant pleaded the statute of limitations; to this the plaintiff replied that the latitat was sued out on the 26th of September 1793, and that the cause of action accrued within 6 years before that time; on which issue was taken.

On the trial before Lord Kenyon the plaintiff gave the following note in evidence: "Three months after date I promise to pay to Mr. Smith, Currier, £40 value received in trust for Mrs. E. Thompson, as witness my hand. L. Askew, 25 June 1787." The defendant objected, 1st. That this note was only evidence of money lent or paid by Mrs. Thompson and not by the plaintiff to the testator; and 2dly, that this was not a promissory note within the statute, and if not, that the cause of action accrued on the 25th of September 1787, three months after the date of the note, and consequently that 6 years had elapsed before the suing out of the writ. The plaintiff answered that as the note was payable to him, it was more proper to bring the action in his name than in that of Mrs. Thompson, and that the money when recovered by him would be recovered for her use; and in answer to the second objection, that this was a promissory note within the statute, in which case three days were allowed; and of course that six years had not expired when the latitat was sued out. A verdict was taken for the defendant, leave being given to the plaintiff to move to set that verdict aside, and to enter a verdict for him, if this court thought he was entitled to recover.

A motion was accordingly made for that purpose.[3]

Lord KENYON, C. J., said: If this were res integra, and there were no decision upon the subject, there would be a great deal of weight in the defendant's objection: but it was decided in a case in Lord Raymond (2 Ld. Raym. 1545) on demurrer, that a note payable to B. without adding or to his order, or to bearer, was a legal note within the act of Parliament. It is also said in Marius that a note may be made payable either to A. or bearer, A. or order, or to A. only. In addition to these authorities I have made enquiries among different merchants respecting the practice in allowing the three days grace, the result of which is that the Bank of England and the merchants in London allow the three days grace on notes like the present. The opinion of merchants indeed would not govern this court in a question of law, but I am glad to find that the practice of the commercial world coincides with the decision of a court of law. Therefore I think that it would be dangerous now to shake

[3] Arguments of counsel are omitted.

that practice, which is warranted by a solemn decision of this court, by any speculative reasoning upon the subject; and consequently this rule must be made absolute to enter a verdict for the plaintiff.

Rule absolute.

PUTNAM v. CRYMES.

(Court of Appeals of South Carolina, 1840. 1 McMul. 9, 36 Am. Dec. 250.)

The plaintiff in this case was not the original payee, but held the note by transfer to himself by delivery. The note was made payable to Mancil Owens or holder, and the plaintiff declared as holder, and defendants demurred, on the ground that the holder could not sue without a written assignment. I regarded holder as synonymous with bearer and overruled the demurrer.

Curia, per BUTLER, J. The word "bearer" is usually inserted in a negotiable note, transferable by delivery. But without it, the maker of a note may make it transferable by delivery, either by circumlocution, or using a word of precisely the same import. As if a note were made payable to A. B., or to any one to whom he may deliver it; or to any one who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to any one who acquires possession by delivery, he has no right to complain when it is presented to him without a written transfer. "Holder" is a word of the same import as "bearer," and both may acquire a title by lawful delivery, according to the terms of the contract. All the law requires is, that the paper must have negotiable words on its face, showing it to be the intention to give it a transferable quality by delivery; otherwise the instrument must be transferred by written endorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all.

The decision below is affirmed: the whole court concurring.[4]

JARVIS v. WILSON.

(Supreme Court of Errors of Connecticut, 1878. 46 Conn. 90, 33 Am. Rep. 18.)

Assumpsit against the defendant as acceptor of an order drawn on him in favor of the plaintiff, brought to the court of common pleas of Hartford county, and tried to the court on the general issue

[4] "The concession, therefore, may be made that if the makers of this note, having omitted the usual words to express negotiability, had said, 'This note is and shall be negotiable', it would have been negotiable." Porter, J., in Raymond v. Middleton, 29 Pa. 529, 530 (1858).

See, also, Stadler v. Bank, 22 Mont. 190, 56 Pac. 111, 115, 74 Am. St. Rep. 582 (1899).

before McManus, J. Facts found and judgment rendered for the plaintiff. Motion in error by the defendant. The case is fully stated in the opinion.

LOOMIS, J. On the 8th of July, 1874, one William Murphy owed the plaintiff $189.20, and drew his order on the defendant in favor of the plaintiff in writing as follows:

"Mr. A. M. Wilson: Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me.

"William Murphy."

Murphy, who was then and had been for some time in the employ of the defendant, had been authorized by the latter to draw orders in favor of his workmen, of whom the defendant knew the plaintiff to be one.

The above order was duly presented for acceptance to the defendant on the same day that it was given, and the defendant said it was good, and verbally promised to pay it. It afterwards appeared that there was in fact due from the defendant to the drawer only $144.94, and thereupon the defendant refused to pay the plaintiff as he had before agreed. The court below upon these facts held the defendant liable for the full amount of the order. We think the judgment must stand against all the objections urged in behalf of the defendant.

The defendant claims, in limine, that his undertaking cannot be regarded as subject to the rules applicable to bills of exchange, but must be treated as a mere promise to pay money. But we do not see why it does not contain every essential element of the most approved definition of a bill of exchange. It is a written order from Murphy, addressed to the defendant, requesting him to pay the plaintiff a certain sum of money therein named. 1 Bouvier's Law Dict., Bill of Exchange; Byles on Bills, 57; Story on Bills, §§ 3, 37, 40; Edwards on Bills and Notes, 150; Eastern R. R. Co. v. Benedict, 15 Gray (Mass.) 292; Kendall v. Galvin, 15 Me. 131, 32 Am. Dec. 141; Michigan Ins. Co. v. Leavenworth, 30 Vt. 12.

But conceding the order to be a bill of exchange, the defendant further claims that he is not liable, because his acceptance was only by parol, when it should have been in writing.

It is true, as a general rule, that to make one liable as a party to a bill or note his name should appear thereon under his own hand or that of his agent. A wise policy may also require that the liability of an acceptor should not depend on parol evidence, and, recognizing this, some states have already changed the rule of the common law as to an acceptor of a bill of exchange. In New York it is required by statute that the acceptance should be in writing, and there is a similar statute in England as applicable to an inland bill. But where there is no statute to control, the rule is quite general, both in England and in the United States, that an acceptance of a bill of exchange may be by parol. 1 Swift, Dig. 424; Story on Bills, §§ 242,

243, 246; 1 Parsons on Cont. 267; Edwards on Bills and Notes, 409; Dunavan v. Flynn, 118 Mass. 539; Spaulding v. Andrews, 48 Pa. 411.

The statute of frauds does not apply to such an undertaking. One reason may be that the acceptor is regarded as the primary debtor, and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

But in this case the defendant relies on the fact that when he accepted the bill he had not in his hands sufficient funds of the drawer to pay the amount required, and contends that the acceptance should therefore either be considered within the statute, or should be held void for want of consideration. This objection ignores the fundamental principle that the acceptance admits everything essential to the validity of the bill, and that want or failure of consideration cannot be shown in a suit by the payee against the acceptor. The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defence against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he owed the drawer that amount. This was exclusively within his knowledge, but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer sufficient to make good the acceptance. Fisher v. Beckwith, 19 Vt. 31, 46 Am. Dec. 174; Arnold v. Sprague, 34 Vt. 402; United States v. Bank of Metropolis, 15 Pet. 377, 10 L. Ed. 774; Grant v. Ellicott, 7 Wend. (N. Y.) 227; Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366; Parsons on Notes and Bills, 323; 1 Daniel on Negotiable Instruments, 135.

There is no error in the judgment complained of.[5]

ZANDER v. NEW YORK SECURITY & TRUST CO.

(Supreme Court, Special Term, New York County, 1902. 39 Misc. Rep. 98, 78 N. Y. Supp. 900.)

Action by Caroline Zander against the New York Security & Trust Company. Demurrer to complaint overruled.

SCOTT, J.[6] It is alleged by the complaint, and admitted by the demurrer, that on or about July 11, 1901, the plaintiff deposited with defendant the sum of $500, and received therefor the following cer-

[5] "It [a check] is commonly though not always payable to bearer; but I conceive it to be still a check, if drawn on a bank or banker, although payable to a particular party only." Story, J., in Re Brown, 4 Fed. Cas. 342, 346 (1843).

[6] Part of the opinion is omitted.

tificate or receipt: "The New York Security & Trust Company, New York, July 11, 1901, has received from Caroline Zander the sum of five hundred dollars, of current funds, upon which the said company agrees to allow interest at the annual rate of three per cent. from this date, and on five days' notice will repay, in current funds, the like amount, with interest, to the said Caroline Zander or her assigns, on return of this certificate, which is assignable only on the books of the company." Then followed provisions as to the reduction or discontinuance of interest, not material here.

Plaintiff always remained the owner of the certificate; has never assigned it, or any part thereof, or in any way indorsed or transferred it, or any interest therein. Before August 9, 1901, she lost or inadvertently destroyed the certificate, and, though she has diligently searched, she has been unable to find it, and on August 9, 1901, she notified defendant of the loss of the certificate. She has duly demanded of defendant the issue of a new certificate or the payment of the amount of the deposit. The demurrer is stated to be interposed merely for the purpose of enabling the defendant to insist that the plaintiff shall be required to give the security specified in section 1917, Code Civ. Proc. That section refers to lost negotiable paper, and the question which presents itself is, therefore, whether or not the certificate of deposit given by defendant is negotiable. Section 20, c. 612, Laws 1897, known as the "Negotiable Instruments Law," declares that an instrument, to be negotiable, "must be payable to order or to bearer," and in this respect is merely declaratory of the law of negotiable paper as it existed before the passage of the statute.

The papers which were before the court in the cases principally relied upon by defendant conformed to the foregoing definition, and in each case the decision turned upon the fact that the lost receipts were payable to "order," which circumstance was held to render them negotiable instruments, and to require that indemnity be given before judgment upon them could be rendered. Frank v. Wessels, 64 N. Y. 155; Read v. Bank, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758. The receipt or certificate in the present case is not negotiable. The money represented by it is payable, not "to order or bearer," but to the plaintiff "or her assigns." It is therefore what is known to the law as a "nonnegotiable instrument." In an action upon a lost or destroyed instrument of this description, it is not necessary that the plaintiff should give or tender indemnity. Wright v. Wright, 54 N. Y. 437; Mills v. Bank, 28 Misc. Rep. 251, 59 N. Y. Supp. 149. The distinction between actions on negotiable and nonnegotiable instruments, and the reason for the different rules respecting the necessity for indemnity in such actions, are too obvious, and too clearly stated in the authorities cited, to require restatement here.

The demurrer admits that the plaintiff never parted with or assigned the certificate, and that it has been lost or destroyed. Even if

the plaintiff had not lost or destroyed the certificate, and has assigned it, the defendant would assume no risk in paying her the amount represented thereby. Section 1909 of the Code of Civil Procedure provides that, except in the case of a negotiable instrument, the transfer of a claim or demand passes an instrument which the transferee may enforce by an action or special proceeding, or interpose as a defense or counterclaim, in his own name, as the transferror might have done, "subject to any defense or counterclaim, existing against the transferror, before notice of the transfer." Payment to the plaintiff would be a complete defense to any claim or action by her upon the certificate of deposit, and equally be a defense of any action or claim by a transferee from her, if made before notice of the transfer; and it does not appear, and is not suggested, that defendant has received any notice of a transfer by her. * * *

Demurrer overruled.[7]

GILLEY v. HARRELL et al.

(Supreme Court of Tennessee, 1907. 118 Tenn. 115, 101 S. W. 424.)

Bill by A. T. Gilley against J. R. Harrell and others. From a decree dismissing plaintiff's bill, he appeals. Affirmed.[8]

SANSOM, Special Judge. The complainant, A. T. Gilley, appeals to this court from the decree of the Court of Chancery Appeals dismissing his bill. The original bill in the case was filed in the chancery court at Murfreesboro to collect a note for $300 alleged to have been executed by the defendant J. R. Harrell to one Robert B. Meeks, and by Meeks transferred and assigned to the complainant, and seeking to foreclose a mortgage or deed of trust given to secure the payment of the note and to set aside a previously executed trust deed resting upon the property.

The bill alleges the execution and transfer of the note, and avers that the plaintiff is an innocent holder thereof, having acquired same before maturity, for value, and in due course of trade; and it is charged that the previously executed trust deed resting upon the property was fraudulent and void.

[7] Affirmed on opinion of Scott, J., 81 App. Div. 635, 81 N. Y. Supp. 1151 (1903). In Brainerd v. Railroad Co., 25 N. Y. 496 (1862), it was held that a corporate bond payable to A. or his assigns was negotiable. Denio, C. J., said (page 500): "But when such obligations are issued to secure the payment of money upon time, and contain on their face an expression showing that they are expected to pass from one person to another, and thus to perform the office of bills and notes or of money, as the words 'bearer' or 'assigns,' or 'the holder,' or the like, the courts of this country, with a single exception, and those of this state without any exception, have concurred in attaching to them the attributes of commercial paper."

Compare Bank of Commerce v. Pick, 13 N. D. 74, 81, 99 N. W. 63 (1904).

[8] Part of the opinion is omitted.

The defendant J. R. Harrell filed an answer, in which he says that he might have executed a note payable to Meeks for $300, and might have executed a mortgage to secure the payment thereof, but that, if he did so, he was drunk at the time and incapacitated for the transaction of business, and that the note, if executed, was without consideration and obtained through fraud, and at a time when he was unable to care for or protect himself. The note sued on is in these words:

"$300. Murfreesboro, Tenn., February 5, 1903.

"On the 24th day of December, 1903, I promise to pay to Robert B. Meeks the sum of three hundred ($300) dollars, with interest from date. This note secured by a mortgage on thirty-five acres of land, this day executed by me and wife to Robert B. Meeks.

"J. R. Harrell."

The note is indorsed as follows:

"I this day transfer and assign this note over to A. T. Gilley, for value received, with all the equities, this February 10, 1903.

"R. B. Meeks."

It should be stated that the answer defends upon the ground that the complainant, Gilley, is a dealer in notes and that the purchase of this note was void, because of his not having to pay any license as such dealer.

Four errors are assigned to the decree of the Court of Chancery Appeals. * * *

Taking up these assignments of error in order: The court held that the note above copied was nonnegotiable, and this holding is attacked. Under the common law the note was not negotiable. "When bills of exchange first came into use, as has already been explained, choses in action in general were nonassignable; and, in order that the intention of parties to make commercial paper assignable and negotiable may be indicated, it became the custom to make it in express terms payable to A., or order, or bearer, or using like words giving authority to convey. So, also, when promissory notes were by the statute of Anne declared to be negotiable, like bills of exchange, notes which would fall within the statute were described as containing these [to order or bearer] or other words of negotiability." Tiedeman on Com. Paper, § 27.

In other words, under the common law in order that a note should be negotiable it had to be payable to order, or to bearer, and not directly to the payee.

Section 3505 of Shannon's Code is in these words: "Every note whereby the maker promises to pay money to any other person or order, or to the order of any other person, shall be negotiable in the same manner as inland bills of exchange by the custom of merchants."

Section 3506 of Shannon's Code is in these words: "Every bill, bond or note for money, whether sealed or not, and whether expressed

to be payable to the order or for value received or not, shall be negotiable in the same manner as promissory notes."

It is insisted very earnestly under this latter Code provision, which is section 1 of chapter 4 of the Acts of 1786, that the note in controversy in this case is a negotiable instrument.

By Acts 1899, p. 139, c. 94, entitled "A general act, relating to negotiable instruments, being an act to establish a law uniform with the laws of other states on that subject," it is provided by article 1, § 1, as follows: "An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer. (2) Must contain an unconditional promise or order to pay a sum certain in money. (3) Must be payable on demand or at a fixed or determinable future time. (4) Must be payable to order or to bearer."

By section 184 of this act it is provided: "A negotiable promissory note, within the meaning of this act, is an unconditional promise in writing, made by one to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to order or to bearer."

Section 8 of the act is in these words: "An instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order."

By section 9 of the act it is provided as follows: "The instrument is payable to bearer (1) when it is expressed to be so payable, or (2) when it is payable to a person named therein or bearer, or (3) when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable, or (4) when the name of the payee does not purport to be the name of any person, or (5) when the only or last indorsement is an indorsement in blank."

The note in question in this case is not payable to either order or bearer. Under these provisions of the negotiable instrument law, and in order to be negotiable, it must be payable in one or the other of these ways, either to order or to bearer. The earnest insistence, however, of appellant, is that section 3506 of the Code (Shannon's), above quoted, is not repealed by the negotiable instrument act of 1899; that that act does not purport to repeal this section of the Code, which does make the note in question a negotiable instrument. This insistence, however, is not sound; for by necessary implication, section 3506 is repealed by this act, because directly in conflict therewith, and embracing the entire subject-matter thereof. Poe v. State, 85 Tenn. 495, 3 S. W. 658.[9] * * *

[9] Accord: Fulton v. Varney, 117 App. Div. 572, 102 N. Y. Supp. 608 (1907); Westberg v. Lumber Co., 117 Wis. 589, 94 N. W. 572 (1903).

SECTION 2.—WRITING

GEARY v. PHYSIC.

(Court of King's Bench, 1826. 5 Barn. & C. 234.)

Assumpsit by the plaintiff as indorsee against the defendant as maker of a promissory note for the sum of £30. payable two months after date to the order of one Folder, and indorsed by him, Folder, to one Kemp, who subsequently indorsed the note to the plaintiff. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1825, it appeared that the indorsement by Kemp to the plaintiff was in pencil, and it was thereupon objected that the plaintiff could not recover; an indorsement in pencil not being such an indorsement as the law and custom of merchants recognizes to be sufficient to pass the interest in a bill of exchange, and promissory notes being by the statute 3 & 4 Anne, c. 9, § 1, assignable or indorsable in the same manner as unpaid bills of exchange are according to the custom of merchants. The Lord Chief Justice thought it sufficient, and directed the jury to find a verdict for the plaintiff, reserving liberty to the defendant's counsel to move to enter a nonsuit, if the court should be of opinion that the indorsement of the promissory note in pencil was not a good and valid indorsement. F. Pollock, in last Easter term, obtained a rule nisi to enter a nonsuit. He contended, first, that a writing in pencil was not a writing recognized at common law; and he cited Co. Lit., 229a, where Lord Coke, speaking of a deed, says: "Here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or on the bark of a tree or on a stone, or the like, &c., and the same be sealed or delivered, yet is it no deed, for a deed must be written, either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption." For the same reasons a writing ought to be made with materials least subject to alteration or corruption. Now, writing made with a pencil is easily altered or obliterated, and, therefore, for the reasons given by Lord Coke, where the law requires a contract to be in writing, it ought to be in writing made with materials the least subject to alteration. Secondly, he contended, that it was not a writing according to the custom and usage of merchants. In point of practice bills of exchange were generally written in ink, and it lay upon the plaintiff in this case to show by evidence that this was a writing according to the custom of merchants. * * *

Suppose the indorsement on the paper had been scratched with a pin, or with the inverted end of a pencil, would that have been a writing according to the custom of merchants?

Thesiger showed cause.[10]

Abbott, C. J. There is no authority for saying that where the law requires a contract to be in writing, that writing must be in ink. The passage cited from Lord Coke shows that a deed must be written on paper or parchment, but it does not show that it must be written in ink. That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to shew that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing, (see the custom stated in Claxton v. Swift, 1 Lutw. 362, Reps.) without specifying the manner with which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff.

Bayley, J. I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the hand-writing were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the hand-writing may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials.

Holroyd, J., concurred.

Rule discharged.[11]

[10] Part of the argument is omitted.

[11] "The defendant, by issuing the instruments, for value, adopted the printed signature thereon as his own, and became thereby bound in the same manner, as if it had been written by himself. He thereby asserted to whomever might receive the instruments that the signature was binding upon him, and he is not at liberty now to retract the assertion. We think it makes no difference, so far as the defendant's liability is concerned, whether he wrote his name in *script* or Roman letters, or whether such letters were made with a pen or with type, or whether he printed, engraved, photographed or litho-

SECTION 3.—THE PROMISE

ISRAEL v. ISRAEL.

(Nisi Prius, before Lord Ellenborough, C. J., 1808. 1 Camp. 499.)

Assumpsit for money lent, and an account stated. Plea, the general issue.

It appeared, that in July last, a settlement of accounts took place between the parties, when the defendant, who is son to the plaintiff, gave him an unstamped slip of paper, with the following words written upon it in his own hand: "I owe my father four hundred and seventy pounds. Jas. Israel." This was now offered in evidence as proof of a debt to that amount.

The Attorney General objected, that it was to be considered either as a promissory note, or a receipt, and that in neither case was it receivable without a stamp.

Garrow & Lawes, on the other side, contended that it was merely an acknowledgment by the defendant, that upon a settlement of accounts, such a balance was due to the plaintiff; and they cited the case of Fisher v. Leslie, 1 Esp. N. P. Cas. 426, in which it had been held by Eyre, C. J. that an I. O. U. was good evidence under the money counts, without a stamp.

Lord ELLENBOROUGH. I entertained some doubts whether this paper ought not to have been stamped as a promissory note; but upon the authority of that case, I will receive it in evidence though unstamped.

The plaintiff had a verdict.

SMITH v. ALLEN.

(Supreme Court of Errors of Connecticut, 1812. 5 Day, 337.)

SMITH, J.[12] This was a writ of error, brought by the defendants in the court below, to reverse a judgment rendered against them in that court.

graphed them, so long as he adopted and issued the signature as his own. It is true, that a written signature in script, may be a safer mode of subscribing one's name, but where a party has adopted a signature made in any other mode, and has issued an instrument with such adopted signature, for value, he is estopped from denying its validity." Beckwith, J., in Weston v. Myers, 33 Ill. 424 (1864).

Accord: Mayers v. McKimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879 (1906).

[12] The statement of the case and arguments of counsel are omitted.

The declaration was in common form, in assumpsit, counting upon a promissory note, and demanding $100, damages. To this there was a demurrer and joinder in demurrer. The writing counted upon, and recited in the declaration, was of the following tenor, viz.:

"Due John Allen $94.91. On demand.

"Litchfield, August 30th, 1808. 'Joseph L. Smith.
"Seth P. Beers."

The court below adjudged the declaration to be sufficient, and rendered judgment for the plaintiff, to recover $111.99, damages.

On inspection of the record, it appears that judgment was rendered for a larger sum than is warranted by law, and therefore, on that ground, is clearly erroneous, and must be reversed.

But still the question arises, whether this cause shall be remanded to the superior court? The decision of this question depends upon the sufficiency or insufficiency of the plaintiff's declaration: Because, if the instrument on which the action is brought, and which is recited in the declaration, will not sustain it, it will be useless to send the cause back for farther trial.

On this subject, in my view, it is very clear that, where a writing contains nothing more than a bare acknowledgment of a debt, it does not, in legal construction, import an express promise to pay. It would not appear, from such a writing, that the parties intended the debt should be paid. Their meaning might be, in such case, merely to settle their accounts, in writing, with a view to further dealings.

But where a writing imports, not only the acknowledgment of a debt, but an agreement to pay it, this amounts to an express contract.

From the writing in question, it is perfectly manifest that the debt acknowledged to be due was to be paid on demand, as fully as if the words "to be paid," or "which we promise to pay," had been inserted next before the words "On demand."

I think, therefore, that the declaration is sufficient, and that the cause ought to be remanded for further proceedings.

The other Judges severally concurred in this opinion.

Judgment reversed, and the cause remanded.

STAGG v. PEPOON.

(Constitutional Court of South Carolina, 1818. 1 Nott & McC. 102.)

This case was tried before Mr. Justice Smith, at Charleston.

It was an action of assumpsit on a duebill, made by the defendant to the plaintiffs. When produced in evidence, it was in the following words: "Due Messrs. Jacob D. Stagg & Co., or order, one hundred and thirty-five dollars, payable on demand. [Signed] Benj. Pepoon."

It appeared in evidence, that the words "or order" were not inserted in the bill originally, and that the plaintiff had requested the defendant to permit him to insert them, with a view to negotiate it; but he expressly refused his assent. The plaintiff, notwithstanding, did insert them.

Several grounds of defense were stated in the brief to have been taken on the trial, in the circuit court, and among others that the insertion of the words "or order" was such an alteration as destroyed the validity of the note.

The jury however, under the direction of the presiding judge, found a verdict for the plaintiff, and a motion was now made for a new trial, on the part of the defendant, on the ground:

That the insertion of the words "or order," in the bill, without the consent of the defendant, is such an alteration, in a material part, as wholly destroyed the validity of the bill, and that the plaintiff was not therefore entitled to recover.

Mr. Justice JOHNSON, delivered the opinion of the court.

It has not been denied in the argument, and numerous authorities prove, that an alteration in a bill of exchange, or promissory note, in a material part, without the consent of the drawer, will discharge him from all liability on it. Chitty on Bills, 85. The duebill, in this case, as it originally stood, without the words "or order," was not negotiable, either by the custom of merchants or the statute of Anne. And that the negotiability of a paper, in mercantile transactions, is material and important, will not be questioned. But it has been suggested that even with the words "or order" the bill was not negotiable, not being a promissory note within the statute of Anne, and that, therefore, the alteration was immaterial, as it did not change the nature and character of the writing.

No precise form of words is necessary to constitute a promissory note; it is sufficient if it amount to a promise or undertaking to pay unconditionally. A "promise to account with J. S. or order," and "I acknowledge myself indebted to A. & Co. to be paid on demand," have been held to be promissory notes within the meaning of the statute of Anne. 1 Selwyn's N. P. 395. It appears to me impossible to distinguish the present case from the last. The word "due" is clearly an acknowledgment of a subsisting debt, and the words "payable on demand" necessarily imply a promise to pay.

I am therefore of opinion that the motion for a new trial ought to prevail.

PURTEL v. MOREHEAD.

(Supreme Court of North Carolina, 1837. 19 N. C. 239.)

This was an action of assumpsit, commenced originally by a warrant before a single justice of the peace. Plea, non assumpsit.

On the trial, before Dick, Judge, at Rockingham, on the last circuit, the plaintiff produced and proved the following acknowledgment:

"Morehead and Field bought of Thomas Purtel hides to the amount of ninety-seven dollars and forty-eight cents; and paid him in leather four dollars and eight cents; leaving a balance of ninety-three dollars and forty cents, due him at the end of three months.

"Burton Field,

"For Morehead & Field."

The defendants on their part offered to prove that the acknowledgment was given as evidence of the probable amount due for a quantity of green hides at 12½ cents the pound, upon the supposition that their weight was a certain amount; that it was agreed, at the time of giving the acknowledgment, that the hides should be weighed when dry, and accounted for at their actual weight; and that, upon their being thus weighed, they fell short 500 or 600 pounds. His honor rejected this evidence; and, the plaintiff obtaining a verdict, the defendants appealed.[13]

DANIEL, J. * * * We suppose he refused it on the belief that the paper was a promissory note, and that the partial failure of consideration could not be admitted in evidence according to the case of Washburn v. Picot, 14 N. C. 390. But we are of the opinion that, as it contains no express promise to pay, it is not a promissory note, but the paper must be considered as an account stated; and then the authorities mentioned in this opinion oblige us to say, that the evidence was admissible.

PER CURIAM. Judgment reversed.

HUYCK v. MEADOR.

(Supreme Court of Arkansas, 1866. 24 Ark. 191.)

CLENDENIN, Special Judge.[14] The appellant in this court, who was the plaintiff in the court below, commenced his action of assumpsit in the circuit court of Pulaski county. The declaration contained two counts; the first count based on the following instrument in writing:

"Due I. Huyck, or order, the sum of three thousand nine hundred

[13] Part of the opinion is omitted.

[14] Part of the opinion is omitted.

and twenty eight dollars ($3,928), for value received of him, and on settlement up to date." C. V. Meador.

"Little Rock, Ark., Feb. 16, 1865.

* * * * * * * * *

We come now to consider the other objection, raised by the record and the assignment of error. This question grows out of the action of the court below in refusing to permit the plaintiff to read as evidence, on the trial, the writing (a copy of which is given before in this opinion), and which writing may be said to be the foundation of the suit. The first count of the declaration avers that the defendant "made his certain promissory note in writing," etc., and that "he promised to pay immediately," etc. The first question to be decided is, was the instrument offered in evidence a promissory note? and, secondly, if it was, when was it payable?

A promissory note is a written promise for the payment of money. Bayley on Bills, 1, 3. The case of Russell v. Whipple, 2 Cow. (N. Y.) 536, was upon a duebill in the following words: "Due Lawson Russell, or bearer, two hundred dollars and twenty-six cents for value received." The court held in this case that this instrument was a promissory note.

In the case of Kimball v. Huntington, 10 Wend. (N. Y.) 679, 680, 25 Am. Dec. 590, the court decided that an instrument similar to the one offered in evidence in this case is a promissory note. As it contains every quality essential to such paper, the acknowledgment of indebtedness on its face implies a promise to pay. So in the case of Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462, it was held that a writing in these words, "Good to Cochran or order, for thirty dollars, borrowed money," is a promissory note. See, also, Smith's Mercantile Law, 263; Luqueer v. Prosser, 1 Hill (N. Y.) 259; Hitchcock v. Cloutier, 7 Vt. 22; United States v. White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374.

Holding, as we do that the instrument declared on in this case and offered in evidence is a promissory note, the inquiry next arises when, by its terms, did it become due and payable. No time of payment being named in the note, it is due immediately, and was so correctly described in the plaintiff's declaration. See Sackett v. Spencer, 29 Barb. (N. Y.) 180; Thompson v. Ketchum, 8 Johns. (N. Y.) 191, 192, 5 Am. Dec. 332; Gaylord v. Van Loan, 15 Wend. (N. Y.) 308; Cornell v. Moulton, 3 Denio (N. Y.) 12.

We are therefore of the opinion that there was no variance between the note offered in evidence and that declared on, and that the circuit court erred in not permitting the note to be read in evidence. * * *

Reversed.[15]

[15] Accord: Kraft v. Thomas, 123 Ind. 513, 24 N. E. 346, 18 Am. St. Rep. 345 (1890).

HUSSEY v. WINSLOW.

(Supreme Judicial Court of Maine, Lincoln, 1870. 59 Me. 170.)

On exceptions.

Assumpsit on a promissory note, commenced by trustee process, in which William Vannah was summoned as trustee of the principal defendant.

The trustee disclosed that on the 4th day of October, 1869, and before the service of the writ in this action on him, he delivered to the said Winslow to whom he was indebted on account, a writing, of which the following is a copy:

5 cent stamp.	"Nobleboro, Oct. 4, 1869. Nathaniel O. Winslow, Cr. By labor 16¾ days @ $4 per day.....$67 00 Good to barer. Wm. Vannah,"

and claimed that he should be discharged.

The presiding judge ruled that the instrument was a negotiable promissory note, and that the trustee be discharged. Thereupon the plaintiff alleged exceptions.[16]

DANFORTH, J. The only question here raised is whether the written instrument, disclosed by the trustee, is a negotiable promissory note. It was evidently so intended by the parties, and seems to possess all that is legally requisite to constitute it such. It is not a mere acknowledgment of a debt, as contended by the plaintiff. It is true that the words, "Cr. by labor 16¾ days @ $4 per day .... $67.00," may very properly be construed as an admission that so much money is due Mr. Winslow for labor performed by him. But the remaining words, "Good to barer," are not inconsistent with what goes before and cannot therefore be rejected. They must have some meaning, and, taken in connection with the words previously used, that meaning cannot be doubtful. In Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462, in a similar instrument the word "good" was held to imply a promise. In the paper under consideration, no other meaning can be attached to it than a promise to pay for the labor received. Nor is the promise to pay in labor. Labor is not mentioned except as the consideration for the promise. The sum due has prefixed to it the mark for dollars, and there is no intimation that it is to be paid in any other way than by money. In such cases the debt can only be discharged by lawful currency. The sum to be paid is definite and subject to no contingency. It is to be paid absolutely, and as no time is given it is payable on demand. Nor can there be any doubt as to the payee, if any were necessary in a note payable to

[16] The arguments of counsel are omitted.

bearer. Nathaniel O. Winslow is named as the person from whom the consideration proceeds, and if there were no other indication as to whom the promise is made the law would deem this sufficient. Story on Notes, § 36.

It would seem that the only possible construction which can be given to this instrument is, substantially, this: In consideration of 16¾ days' labor, performed by Nathaniel O. Winslow, at $4 per day, amounting to $67, I promise to pay him or bearer, that sum on demand. [Signed] William Vannah.

Here we have every element of a negotiable promissory note; a maker, a payee, a promise or engagement to pay a certain sum of money at a specified time, absolutely and unconditionally, and the word "bearer" to make it negotiable.

Exceptions overruled.

COWAN v. HALLACK.

(Supreme Court of Colorado, 1887. 9 Colo. 572, 13 Pac. 700.)

Action on the following instrument:

"Denver, Colo., July 15, 1881.

"Mr. H. A. Garvey bought of E. F. Hallack, manufacturer and wholesale and retail dealer in lumber, lath, shingles, sash, doors, blinds, mouldings, trimmings, paints, oils, window glass, roofing paper, pitch, building paper, cement, plaster of Paris, plastering hair, etc.:

"June 21.	To 114 lbs. tarred felt, 3½	$	3 99
	Express charges		25
	To 15 bbls. Eng. Port. cement		108 00
June 27.	To 10 " " " "		72 00
June 27.	To 5 " " " "		36 00
July 2.	To 2 " " " "		14 40
July 5.	To 1 " " " "		7 20
July 6.	To 5 " " " "		36 00
		$277	84"

Indorsed upon the account was the following:

"I hereby accept this bill, in compliance with the terms of contract and specifications with Mr. H. A. Garvey, payable to E. F. Hallack thirty days after July 9, 1881.

"E. R. Cowan." [17]

ELBERT, J. Hallack's account with Garvey, upon which the undertaking sued upon appears to have been indorsed, is an ordinary item-

[17] The statement of the case is abridged, and a portion of the opinion omitted.

ized statement by a merchant of his account with a debtor. The language of the undertaking so indorsed is as follows:

"I hereby accept this bill, in compliance with the terms of contract and specifications with Mr. H. A. Garvey, payable to E. F. Hallack thirty days after July 9, 1881.

"[Signed] E. R. Cowan."

The defense admitted the signature, and that no payment had been made. Aside from this, the undertaking was all the evidence introduced on the trial in the court below, and upon it the plaintiff recovered judgment. Two points are made by counsel: (1) That no consideration was alleged or proved, and that, therefore, the court erred in overruling the defendant's motion for a nonsuit; (2) that the court erred in sustaining the demurrer to the third defense.

It is well understood that in an action upon a simple contract, the plaintiff, in order to recover, must allege and prove a consideration. In this connection, however, it is to be remembered—First, that the admission of a consideration by the terms of the written contract is prima facie evidence of its existence, and satisfies the rule; second, that negotiable instruments import a consideration, and are exceptions to the rule. 1 Pars. Cont. 430; 1 Daniel, Neg. Inst. § 161; Whitney v. Stearns, 16 Me. 394. We do not think that the instrument sued upon contains, by its terms, an admission of such a consideration as in itself relieved the plaintiff from the necessity of making proof of a consideration. It admits a contract with Garvey to accept, but it does not disclose any consideration for such a contract, and we are not at liberty to presume its existence. It would be illogical to treat that as a consideration which itself depends for its value and validity upon the existence of a consideration. Whether the writing imports a consideration is a more difficult question, and depends upon whether it is negotiable under the provisions of the statute concerning bonds, bills, and promissory notes. Chapter 9, Gen. St. 142. Section 3 of the act provides that "all promissory notes, bonds, duebills, and other instruments in writing, made by any person, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom the said note, bond, bill, or other instrument in writing is made." Section 4 provides that "any such note, bill, bond, or other instrument in writing, made payable to any person or persons, shall be assignable by indorsement thereon, under the hand of such person and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively."

Under this statute all promissory notes and instruments in writing for the payment of money are negotiable, whether so expressed or not. And whether the particular instrument contains the words "or

order," or equivalent words, or not, its legal effect is the same as if it did contain such words. Thackaray v. Hanson, 1 Colo. 366; Roosa v. Crist, 17 Ill. 450, 65 Am. Dec. 679; Archer v. Claflin, 31 Ill. 306. To constitute a good promissory note, no precise words of contract are necessary, provided they amount, in legal effect, to a promise to pay. In other words, if over and above the mere acknowledgment of the debt there may be collected from the words used a promise to pay it, the instrument may be regarded as a promissory note. 1 Daniel, Neg. Inst. § 36 et seq.; Byles, Bills, 10, 11, and cases cited. See, also, the following decisions under statutory provisions similar to our own: Bilderback v. Burlingame, 27 Ill. 338; Archer v. Claflin, 31 Ill. 306; Jacquin v. Warren, 40 Ill. 459; White v. Smith, 77 Ill. 351, 20 Am. Rep. 251; Petillon v. Lorden, 86 Ill. 361; Stacker v. Hewitt, 1 Scam. (Ill.) 207; Smith v. Bridges, Breese (Ill.) 18; Williams v. Forbes, 47 Ill. 148; Sappington v. Puliam, 3 Scam. (Ill.) 385; Roosa v. Crist, 17 Ill. 450, 65 Am. Dec. 679; Wilder v. De Wolf, 24 Ill. 190.

"Due A. B. $325, payable on demand," or, "I acknowledge myself to be indebted to A. in $109, to be paid on demand for value received," or, "I. O. U. $85 to be paid May 5th," are held to be promissory notes, significance being given to words of payment as indicating a promise to pay. 1 Daniel, Neg. Inst. § 39, and cases cited.

Hallack's itemized account with Garvey, upon which the undertaking of the defendant is indorsed, is in no sense negotiable paper. The indorsement thereon, however, signed by the defendant, is a new undertaking; and if, under our statutes, it is negotiable, it imports a consideration. Bay v. Freazer, 1 Bay (S. C.) 72. The word "accepted" on a bill of exchange is an engagement to pay the bill in money when due. Indorsed upon nonnegotiable paper, as in this case, there is authority for saying that it would not import a consideration as in the case of such indorsement upon negotiable paper, and a consideration would have to be alleged and proved. Byles, Bills, 3, note; Jeffries v. Hager, 18 Mo. 272; Richardson v. Carpenter, 2 Sweeny (N. Y.) 366. The language of the undertaking, however, must be considered as a whole, and in this case we think it clearly imports a promise upon the part of the defendant Cowan to pay Hallack, the payee, the amount of the bill upon which it is indorsed, at the time specified. 1 Daniel, Neg. Inst. § 36 et seq., and cases cited.

We think the writing comes clearly within the provisions of the statute which we have quoted; that is to say, it is "an instrument in writing" made by the defendant Cowan, whereby he promises to pay in money, at a specified date absolute, the amount of the bill upon which the undertaking is indorsed. As such it is a negotiable instrument, and imports a consideration. Our statute in this respect, is substantially the statute of 3 & 4 Anne, c. 9 (1 Daniel, Neg. Inst. § 5, note; Id. § 162), the effect of which was, in an action upon

a promissory note, to dispense with the necessity of either alleging or proving a consideration. Peasley v. Boatwright, 2 Leigh (Va.) 198. In this view, the plaintiff was entitled to recover on the evidence introduced, and the defendant's motion for a nonsuit was properly overruled. * * *

Affirmed.

GAY v. ROOKE.

(Supreme Judicial Court of Massachusetts, Middlesex, 1890. 151 Mass. 115, 23 N. E. 835, 7 L. R. A. 392, 21 Am. St. Rep. 434.)

Contract on the following instrument, declared on as a promissory note:

"Marlboro', Sept. 23, 1881.

"I. O. U., E. A. Gay, the sum of seventeen dolls. 5/100, for value received. John R. Rooke."

Writ dated September 19, 1887. At the trial in the superior court, without a jury, before Dewey, J., the only issue was whether the plaintiff was entitled to interest from the date of the instrument, or from that of the writ, the service of which was the only demand made by the plaintiff.

The plaintiff asked the judge to rule, as matter of law, that he was entitled to interest from the date of the instrument. The judge declined so to rule, and ruled that interest could be recovered from the date of the writ only, and found for the plaintiff for $17.05 only; and the plaintiff alleged exceptions.

DEVENS, J. In order to constitute a good promissory note, there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient. Story, Prom. Notes, § 14; Brown v. Gilman, 13 Mass. 158. While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom. Commonwealth Ins. Co. v. Whitney, 1 Metc. 21. In this view, the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only; and, although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt, and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was therefore held in Gray v. Bowden, 23 Pick. 282, that a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker, and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the statute of limitations. In England an I. O. U., there being no promise to pay embraced therein, is treated

as a duebill only. The cases, which arose principally under the stamp act, are very numerous, and they have held that such a paper did not require a stamp, as it was only evidence of a debt. 1 Daniel, Neg. Inst. (3d Ed.) § 36; 1 Rand. Com. Paper, § 88; Fesenmayer v. Adcock, 16 Mees. & W. 449; Melanotte v. Teasdale, 13 Mees. & W. 216; Smith v. Smith, 1 Fost. & F. 539; Gould v. Coombs, 1 C. B. 543; Fisher v. Leslie, 1 Esp. 425; Israel v. Israel, 1 Camp. 499; Childers v. Boulnois, Dowl. & R. N. P. 8; and Beeching v. Westbrook, 8 Mees. & W. 412.

While, in a few states, it has been held otherwise, the law as generally understood in this country is that, in the absence of any statute, a mere acknowledgment of a debt is not a promissory note; and such is, we think, the law of this commonwealth. Gray v. Bowden, 23 Pick. 282; Commonwealth Insurance Co. v. Whitney, 1 Metc. 21; Daggett v. Daggett, 124 Mass. 149; Almy v. Winslow, 126 Mass. 342; Carson v. Lucas, 13 B. Mon. (Ky.) 213; Garland v. Scott, 15 La. Ann. 143; Currier v. Lockwood, 40 Conn. 349, 16 Am. Rep. 40; Brenzer v. Wightman, 7 Watts & S. (Pa.) 264; Biskup v. Oberle, 6 Mo. App. 583. Some states have by statute extended the law of bills and promissory notes to all instruments in writing and whereby any person acknowledges any sum of money to be due to any other person. 1 Randolph, Com. Paper, § 88; Rev. St. Ill. 1884, c. 98, § 3; Gen. St. Colo. 1883, c. 9, § 3; Rev. St. Ind. 1881, § 5501; Rev. Code Iowa, 1873, § 2085; Rev. Code Miss. 1880, §§ 1123, 1124.

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to pay has been gathered, or where the form of the instrument fairly led to that conclusion. Daggett v. Daggett, 124 Mass. 149. Almy v. Winslow, 126 Mass. 342. No such words exist in the instrument sued, nor is it in form anything but an acknowledgment. The words "for value received" recite indeed the consideration, but they add nothing which can be interpreted as a promise to pay. It is therefore unnecessary to consider whether, if the paper were a promissory note, interest should be calculated from its date. Upon this point we express no opinion. If it is to be treated as an acknowledgment of debt only, as we think it must be, the plaintiff is not entitled to interest except from the date of the writ. Even if it was the duty of the defendant to have paid the debt on demand, yet if no demand was made, if no time was stipulated for its payment, if there was no contract or usage requiring the payment of interest, and if the defendant was not a wrongdoer in acquiring or detaining the money, interest should be computed only from the demand made by the service of the writ. Dodge v. Perkins, 9 Pick. 368; Hunt v. Nevers, 15 Pick. 500, 26 Am. Dec. 616. "In general," says Chief Justice Shaw, "when there is a loan without any stipulation to pay interest, and where one has the money of another, having been guilty of no wrong in obtaining

it, and no default in retaining it, interest is not chargeable." Hubbard v. Charlestown Railroad Co., 11 Metc. 124; Calton v. Bragg, 15 East, 223; Shaw v. Picton, 4 Barn. & C. 723; Moses v. Macferlan, 2 Burr. 1005; Walker v. Constable, 1 Bos. & P. 306.

Exceptions overruled.

SECTION 4.—THE ORDER

RUFF v. WEBB.

(Nisi Prius, before Lord Kenyon, C. J., 1794. 1 Esp. 129.)

Assumpsit for work and labour, with the common counts.

Plea of the general issue.

The action was brought to recover the amount of wages due by the defendant to the plaintiff.

The plaintiff had been servant to the defendant, and, on his discharging him from his service, had given him a draft for the amount of his wages on an unstamped slip of paper, in the following words:

"Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account."

This draft the plaintiff had taken, but it did not appear that he had ever demanded payment of it from Mr. Nelson, to whom it was addressed.

It was given in evidence on the part of the defendant, that he lived in the country, and kept cash with Mr. Nelson in London, and that he paid all his bills in that manner, by drafts on Nelson; that the plaintiff knew that circumstance, and took the draft without any objection; and that if he had applied to Nelson, that it would have been paid. This evidence was relied on as a discharge, and bar to the action.

Shepherd, for the plaintiff, contended that the only mode by which this could operate as a bar to the action was by taking the draft in question as a bill of exchange; in which case, under St. 3 & 4 Anne, c. 9, § 7, it is declared that if any person shall accept a bill of exchange, in satisfaction of a debt, that the same shall be deemed a full and sufficient discharge, if the person so accepting such bill for his debt shall not take his due course, by endeavoring to get the same accepted and paid, and making his protest for nonacceptance or nonpayment; but he contended that in point of substance it was not a bill of exchange, but a mere request to pay money, not accepted by Nelson, or such as could put the plaintiff into any better situation with respect to his demand. But, if it was taken as a bill of ex-

change, that it could not be given in evidence at all, as it was not stamped.

It was answered by the defendant's counsel that the plaintiff's having accepted the draft as payment was a waiver of every objection to it, and that he was therefore bound by it, and could not recur to the demand for wages.

Lord KENYON said he was of opinion that the paper offered in evidence was a bill of exchange; that it was an order by one person to another to pay money to the plaintiff or his order, which was in point of form a bill of exchange; that as such it could not be given in evidence, without being legally stamped; and, as the only mode in which it could operate as a discharge of the plaintiff's demand was as stated by the plaintiff's counsel, that the plaintiff in point of law was therefore entitled to recover.

LITTLE v. SLACKFORD.

(Nisi Prius, before Lord Tenterden, C. J., 1828. Moody & M. 171.)

Debt for money paid.

The defendant, being indebted to J. S. for work done, gave him an unstamped paper addressed to the plaintiff in the following words:

"Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige

"Your humble servant, R. Slackford."

There was also some slight evidence that the defendant had acknowledged the debt.

Comyn, for the defendant, objected that the paper produced was a bill of exchange, and could not be read for want of a stamp, and the other evidence would not warrant a verdict.

Lord TENTERDEN, C. J. I think no stamp is necessary. The paper does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, "You will oblige me by doing it." Even without the paper, the other evidence would probably entitle the plaintiff to a verdict.

Verdict for the plaintiff.

HAMILTON v. SPOTTISWOODE.

(Court of Exchequer, 1849. 4 Exch. 200.)

The parties, pursuant to the order of Parke, B., agreed to state, for the opinion of the court, the following case:

On the 24th of September, 1842, Alexander Wilson and Patrick Wilson, carrying on the business of typefounders in partnership, under the firm of Alexander Wilson & Sons, were indebted to William

Gentle in £6000, for money lent by him to them, no part of which has been paid, except as hereinafter mentioned. The defendant and the firm of Messrs. Eyre & Spottiswoode, of which the defendant was a member, were partners, and had, for some time previously to the date aforesaid, dealt with Alexander Wilson & Sons, purchasing from them, from time to time, large quantities of type payable quarterly, and for which corresponding quarterly accounts used to be sent in by Alexander Wilson & Sons up to the 31st March, 30th June, 30th September, and 31st December in each year, and it was then expected that those dealings would be continued, as they afterwards were. Alexander Wilson & Sons being applied to for payment, delivered to William Gentle the following order or authority in writing, signed by them and directed to the defendant:

"To Alexander Spottiswoode, Esq.

"London, 24th Sept., 1842.

"Dear Sir—We hereby authorize you to pay on our account, to the order of William Gentle, Esq., the sum of six thousand pounds, at the following periods, deducting the amount from the quarterly accounts for type furnished to you and to Messrs. Eyre & Spottiswoode, viz.:

11th November, 1843	£1,000
11th November, 1844	1,000
11th November, 1845	1,000
11th November, 1846	1,500
11th November, 1847	1,500

"We are, dear sir, yours very truly,

"Alexander Wilson & Sons."

The said order or authority was thereupon taken to the defendant, and underneath the same he wrote the following letter or memorandum, addressed to William Gentle: "Dear Sir—Having received the foregoing authority from Messrs. A. Wilson & Sons, I undertake to make you the payments as above stated. Middle New-Street, September 24, 1842. Andrew Spottiswoode"—which was then, with the defendant's consent, handed to William Gentle. * * *

The question for the opinion of the court is, first, whether the writing dated 24th September, 1842, requires a bill of exchange or promissory note stamp.[18]

POLLOCK, C. B. We are all of opinion that the letters do not require a bill of exchange or promissory note stamp; they do not import an absolute intention that the money should at all events be paid, but merely authorize the defendant to pay it. As to the other point we will take time to consider.

Cur. adv. vult.

The judgment of the court was now delivered by

[18] The statement is abridged, and the arguments and a portion of the opinion of Alderson, B., are omitted.

ALDERSON, B. We intimated, at the time of the first argument in this case, our opinion that the two letters dated the 24th of September, 1842, the first from Wilson & Sons to the defendant, and the second, written on the same paper, from the defendant to the testator Mr. Gentle, do not require to be stamped, either as a promissory note or bill of exchange, but only constitute and require to be stamped as an agreement. That opinion we still retain. We do not think this is an order to pay any particular sum of money at all; but we are of opinion that it amounts to an agreement, that, if any of the specified portions of debt mentioned therein be at any time unpaid by Messrs. Wilson & Sons to Mr. Gentle, and if, after that event has occurred and come to the knowledge of the defendant, any quarterly accounts for type should become due from the defendant to Wilson & Sons, the defendant would, so far as those accounts would extend, pay the debt due from Wilson & Sons to Gentle, of which he might so have notice. Such an agreement, when assented to by all the parties, would be irrevocable. Then, if so, it seems to follow that the plaintiffs are entitled to recover in the present suit. * * *

Judgment for the plaintiffs.

LUFF v. POPE.

(Supreme Court of New York, 1843. 5 Hill. 413.)

On the merits, it appeared that the action was brought upon the following instrument:

"New York, Dec. 9, 1838.

"Thirty days after sight pay Henry Pope or his order sixty-six dollars and ninety-seven cents, and place the same to account of yours, Abm. Bell.

"To Mr. Martin Luff, New York."

The draft was presented to the defendant for acceptance two days after its date, and was duly protested by a notary for nonacceptance. The plaintiff proved that he had a demand against Bell, and, on calling for payment, Bell said he had funds in the hands of the defendant, and thereupon made this draft for the amount of the plaintiff's demand. On presenting the draft the defendant said he would pay it by the 1st of February or the 1st of March; but he refused to accept it, or to make any promise in writing. The plaintiff gave evidence tending to show that the defendant had funds of Bell in his hands sufficient to pay the bill, and the defendant gave rebutting evidence. The defendant moved for a nonsuit, on the ground that there was no acceptance in writing, and because the defendant positively refused to accept the bill. The motion was denied by the justice, on the ground that he did not think this a bill of exchange within the meaning of the statute. He said it was known to all the

parties that the instrument was drawn on a particular fund, and he regarded it as a transfer of a chose in action. The jury were afterwards charged that, if this was a bill of exchange within the common acceptation of business men, the plaintiff could not recover for want of a written acceptance. But if it was only an order, or instrument in writing to transfer so much of the specific fund of Bell in the hands of Luff as would pay Bell's debt to Pope, then it was not within the statute, and the defendant was liable, provided he had funds. The jury found for the plaintiff as before mentioned. Judgment of affirmance having been perfected in the superior court, the defendant in the marine court brought error.[19]

Bronson, J. * * * On the merits, the judgment of the marine court was clearly erroneous, and should have been reversed. There is no color for the argument that the instrument on which the plaintiff sued was not a bill of exchange. A bill of exchange is a written order or request by one person to another, for the payment, absolutely and at all events, of a specified sum of money to a third person. Now what have we here? Bell requests Luff, 30 days after sight, to pay a specified sum of money to Pope. It is payable absolutely, and without reference to any particular fund; and if it be not a bill of exchange, the wit of man cannot devise one. The justice thought it was not a bill, but only "an order or instrument in writing," because it was said at the time, and the proof tended to establish the fact, that Luff had funds in his hands belonging to Bell. It would be enough to say that a written instrument, which is perfectly plain and explicit on its face, cannot be changed into something else by anything which the parties said at the time of making it, nor by any inquiry into extrinsic facts. It must speak for itself. But the notion that there cannot be a bill of exchange where the drawee has funds, if it be not entirely new, cannot date back further than 1836. It contradicts the very theory, and all the right use of a bill of exchange, which is always supposed to be drawn on funds. Incalculable mischief has resulted from the modern practice of drawing without funds, which is little better than a fraudulent use of the instrument. And although such bills have been tolerated, we have not yet gone so far as to make it unlawful to pursue the old-fashioned honest course of drawing, where the means for payment have already been provided.

Whether the payee takes the bill in satisfaction of a debt due from the drawer, or advances the money for it, cannot be a matter of any importance as between him and the drawee. It does not affect the nature of the instrument.

The statute requires that the acceptance should be in writing. 2 Rev. St. 768, § 6. Here there is not only the want of any writing, but the defendant positively refused to accept, and the bill was pro-

[19] The statement of the case is abridged, and a part of the opinion omitted.

tested for nonacceptance. And yet the defendant has been held liable. An examination of this case in all its facts would go very far to confirm the policy of the statute. But it is enough that we cannot repeal it, and until that is done the plaintiff cannot recover. He must take his remedy against the drawer; and if Bell has any money in the hands of the defendant, which is very questionable, he must sue for it. It is a chose in action, which cannot be transferred so as to give the assignee a right to sue in his own name, except in the form of an accepted bill of exchange. To give a parol promise to pay the effect of a written acceptance of the bill would be no better than a device to get round the statute and defeat all the valuable ends which it was designed to accomplish. If Quin v. Hanford, 1 Hill, 82, does not support, it certainly does not conflict with this doctrine. In Harrison v. Williamson, 2 Edw. 430, 438, the Vice Chancellor said: "A bill of exchange has not the effect of an assignment of the money for which it is drawn in the hands of the drawee, unless, perhaps, where it is drawn upon a particular fund, and then, indeed, by the law merchant, it loses its character as a bill of exchange." He undoubtedly alluded to a class of cases, some of which are cited in Quin v. Hanford, where an order, either not payable in money, or else drawn on a particular fund, has, after acceptance or promise of payment, been allowed to operate as an equitable assignment of the fund. And see Morton v. Naylor, 1 Hill, 583. This has been done upon a very liberal construction of the acts of the parties, for the advancement of justice. But those cases have nothing to do with a bill of exchange proper, which is an instrument of a peculiar nature, and governed by its own laws. Although it is used for the purpose of transferring funds, and has that effect in the result, it never operates as an assignment to the payee of any particular money in the hands of the drawee. If the latter accepts the bill, the payee or other holder may sue upon the contract of acceptance. But if the drawee refuse to accept, there is no contract between him and the holder, and no action will lie. And this is so, although the drawee had funds, and ought, in justice to the drawer, to have paid the bill.

We think all these judgments are erroneous, and they must therefore be reversed.

SECTION 5.—CHARACTER OF THE ORDER OR PROMISE

(I) As to Conditions

JOSSELYN v. LACIER.

(Court of King's Bench, 1715. 10 Mod. 294, 317.)

This was a writ of error upon a judgment given in the court of common pleas in an action of assumpsit, where the plaintiff declared that Evans drew a bill upon Josselyn, requiring him to pay Lacier seven pounds every month (the first payment to begin in December, about two months after the date of the note) out of the growing subsistence of Evans, and place it to his account; that Lacier carried the note to Josselyn, who accepted it, and promised to pay it, secundum tenorem billæ, by which acceptance, according to the custom of merchants, he became liable; and that afterwards he refused to pay, etc.[20]

Parker, Chief Justice, delivered the opinion of the court.

In this case, two points are considerable: First, whether this be a good bill of exchange? We are all of opinion that it is not a bill within the custom of merchants; it concerns neither trade nor credit; it is to be paid out of the growing subsistence of the drawer; if the party die, or his subsistence be taken away, it is not to be paid. It may be never paid, and yet his credit unimpeached. * * *

The judgment was reversed.

MACLEED v. SNEE.

(Court of King's Bench, 1727. 2 Str. 762.)

Error of a judgment in C. B., wherein the plaintiff declares that A. B. drew a bill of exchange dated 25th of May, whereby he requested the defendant one month after date to pay to the plaintiff or order £9. 10s. "as my quarterly half-pay," to be due "from 24th of June to 27th of September next, by advance." And the action is against the defendant upon his acceptance.

It was objected that this was no bill of exchange, because it is not to pay in all events, but is left to the pleasure of the person on whom it is drawn, either to advance the money or not; and it was compared to the case of Josselyn v. Lacier, 10 Mod. 294, 317, which was to pay out of his growing subsistence, and to the case of Jenney

[20] Arguments of counsel and part of the opinion are omitted.

v. Herle, 2 Ld. Raym. 1361, which was payable out of a particular fund, and in both cases held to be no bills of exchange.

Sed Per Curiam. The quarterly half-pay is a certain fund, which the growing subsistence was not; the mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person. The reason it was held no bill of exchange in Jenney v. Herle was because it was no more than a private order to a man's servant. Judgment affirmed.

CARLOS v. FANCOURT.

(Court of King's Bench, 1794. 5 Term R. 482.)

This was an action upon promises, and was brought in the court of common pleas. The first count of the declaration alleged that the defendant (below) in the life-time of A. Fancourt, the late wife of the plaintiff (below), on the 27th of July, 1786, made and signed his certain note in writing, commonly called a promissory note, and thereby promised to pay to the said A. Fancourt, then being the plaintiff's wife, the sum of £10. "out of his the said defendant's money that should arise from his reversion of £43. when sold," and delivered the said note to the said A. F.; whereby and by reason of which several promises, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof afterwards &c, promised to pay &c, yet that he did not &c. although often requested &c. and although the said reversion of the said £43. was sold before the suing forth of the original writ &c. The declaration contained other counts, for work and labour; money paid; &c.

The defendant suffered judgment to go by default; and a general judgment was entered up on the whole declaration. A writ of error was then brought; and the plaintiff in error assigned for error, that there was a general judgment on all the counts in the declaration, the first of which was founded on a supposed promissory note, as a note within the statute made concerning promissory notes, whereas it was not a note within the statute, but a contingent note; and on which, as stated in the declaration, it appeared to be uncertain whether or not the money therein specified would ever become payable, and was therefore void in law; and that it did not appear that the note was given for value received or for any valuable or legal consideration whatever &c.[21]

Lord Kenyon, C. J. The question in this case is not whether the plaintiff in error, who may have promised for a valuable considera-

[21] Arguments of counsel are omitted.

tion to pay to the defendant a certain sum of money on an event, which has since happened, is or is not bound to perform that promise; if this promise were made on a consideration, there is no doubt but that an action might be maintained on it, as on a special agreement: but the question now before the court is whether or not the note set forth upon the record can be declared on as a negotiable security under the statute 3 & 4 Anne, c. 9. The object of that act was to put promissory notes on the same footing with bills of exchange in every respect. Vide Brown v. Harraden, 4 Term R. 148. It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to enquire when these uncertain events would probably be reduced to a certainty. It has been admitted, in the argument, that if this were a bill of exchange the declaration could not be supported: many cases indeed were cited by the counsel on the other side to prove that position, to which may be added another in Lord Raymond (vide Jenny v. Herle, 2 Ld. Raym. 1361), where it was decided that a bill, which was not payable at all events, could not be considered as a bill of exchange: and this admission by the counsel for the defendant in error is decisive of this case; for there is no difference in this respect between promissory notes and bills of exchange; they both stand in pari ratione. If we were to render this point in the least doubtful, we should shake the foundation of that which has been considered as clear law ever since the time of Lord Holt. I am therefore clearly of opinion that this note cannot be declared upon as a negotiable instrument; at the same time I have no doubt but that an action might be framed on it as on a special agreement. The justice of the case is certainly with the defendant in error: but we must not transgress the legal limits of the law, in order to decide according to conscience and equity. We need have no reluctance in reversing the judgment of the common pleas, because as this was a judgment by default, that court had no opportunity of exercising their judgment upon the question.

Ashhurst, J. Before the statute of Anne promissory notes were not assignable as choses in action, nor could actions have been brought on them, because the considerations do not appear on them; and it was to answer the purposes of commerce that those notes were put by the statute on the same footing with bills of exchange. Then they cannot rest on a better footing than bills of exchange, but must stand or fall on the same rules by which bills of exchange are governed. Certainty is a great object in commercial instruments; and unless they carry their own validity on the face of them, they are not negotiable; on that ground bills of exchange, which are only payable on a contingency, are not negotiable, because it does not appear on the face of them whether or not they will ever be paid. The same rule then that governs bills of exchange in this respect must also

govern promissory notes. And therefore, though this might have been declared on as a special agreement, stating the consideration for the promise, and the sale of the reversion of £43., yet this action cannot be maintained. This does not come within the custom of merchants respecting bills of exchange, nor is it a negotiable instrument within the statute of Anne, because as a bill of exchange it would not be good.

GROSE J. The plaintiff below could only declare either on this instrument, as a note under the statute of Anne, or on the special contract that existed between the parties. He has declared on the former; but this is not a negotiable instrument, because it is not payable at all events. It has been said however that there is a difference in this respect between promissory notes and bills of exchange: but no decision has been cited to warrant such a distinction; and without such an authority I think that we ought not to establish it; for the words of the statute of Anne are "therefore to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner &c." It clearly appears therefore to have been the intention of the Legislature to put promissory notes on the same foundation as bills of exchange. Now if this had been a bill of exchange, the declaration drawn on it as on a bill within the custom of merchants would have been bad, because the money was only to be paid on a contingency. Then if the plaintiff below had declared on this as on a special contract, he should have shown not only that there was a consideration for the promise, but also that the reversion was sold for at least £10.; whereas here it is merely averred that the reversion was sold, without saying for how much. In whatever way therefore this question is considered, I think the declaration cannot be supported.

Judgment reversed.[22]

[22] Accord: Fulton v. Varney, 117 App. Div. 572, 102 N. Y. Supp. 608 (1907). See Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108 (1907). In Allison v. Hollembeak, 138 Iowa, 479, 114 N. W. 1059 (1908), the following indorsement was held to make a note nonnegotiable: "This note is secured by purchase-money mortgage on 160 acres of land in Guthrie Co., Ia., and payee herein agrees to look to mortgage security for the payment of this note." In Nat. Sav. Bk. v. Cable, 73 Conn. 568, 48 Atl. 428, 429 (1901), the following instrument was held not a bill: "New Haven, Conn., Aug. 16, 99. Treas. Nat. Sav. Bk. New Haven: Pay J. C. Cable, or order, $300, or what may be due on my deposit book. No. E632. [Signed] John D. Edwards." The court said: "It is payable out of a particular fund. It is to pay $300, or what may be due on a specified book. The amount to be paid is made to depend upon the adequacy of a specific fund. Such an order is conditional, and so not negotiable. Neg. Inst. Law, §§ 1, 3."

JURY v. BARKER.

(Court of Queen's Bench, 1858. El., Bl. & El. 459.)

Action by the indorsee of a promissory note against the maker.

Plea, to the first count (on the promissory note): That the supposed promissory note in that count mentioned was and is in the words and figures following, that is to say:

"London, 29th Oct., 1857.

"I promise to pay to Mr. J. C. Saunders, or his order, at three months after date, the sum of one hundred pounds as per memorandum of agreement. Henry John Barker.

"Payable at 105 Upper Thames Street, London."

Demurrer. Joinder.

O'Malley, for the plaintiff. The defendant contends that the words "as per memorandum of agreement" destroy the negotiability of the instrument as a promissory note under St. 3 & 4 Anne, c. 9. But that is not so; those words do not limit the absolute promise in writing, signed by the maker, to pay a certain sum to a certain person at a certain time; and that is all that the statute requires. The note here shows the existence of a prior agreement, and earmarks, as it were, the promissory note, so as to prevent the supposition that the payment is to be in respect of any other matter than the sum of money due under that agreement. But the note is still an absolute and unconditional promissory note.

[Lord CAMPBELL, C. J. The plea, to be good, should have set out the agreement, and shown that such agreement made the note conditional.]

Raymond, for the defendant. The instrument is not a promissory note within either the law of merchants or St. 3 & 4 Anne, c. 9. It is not, upon the face of it, an unconditional promise to pay: the words "as per memorandum of agreement" are, at least, ambiguous, and might refer to some arrangement which would render the note valueless to endorsees. [ERLE, J. The words might mean only "as I agreed to do."] But they might have another meaning, and one which would render the promise to pay conditional. The note must, on the face of it, be an absolute promise to pay.

Lord CAMPBELL, C. J. The note here is an absolute and unconditional promise, as to the payer, the payee, the amount, and the date. If the addition of the words in question make the promise conditional, it is on the defendant to show that; and he has not done so.

COLERIDGE and ERLE, JJ., concurred. CROMPTON, J., was absent.

Judgment for the plaintiff.[23]

[23] Accord: Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698 (1895). Compare Dilley v. Van Wie, 6 Wis. 209 (1858).

WELLS v. BRIGHAM.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 6, 52 Am. Dec. 750.)

This was an action of assumpsit, tried before Byington, J., in the court of common pleas, by the plaintiff, as the payee, against the defendant, as the drawee and acceptor of a draft drawn by one George Clay, dated the 2d of January, 1848, of which the following is a copy: "Mr. Brigham—Dear Sir: You will please pay Elisha Wells $30, which is due me for the two-horse wagon bought last spring, and this may be your receipt." The plaintiff declared on the common counts, and filed the draft as a bill of particulars. The defendant objected to the giving of the draft in evidence under the common counts; also that the draft did not, on the face of it, import a consideration between the payee and the drawer; and that the plaintiff must prove such consideration affirmatively. But the judge overruled these objections. * * *

The jury found a verdict for the plaintiff and the defendant excepted.[24]

SHAW, C. J. This is assumpsit by the payee against the acceptor, on a draft for $30, drawn by one George Clay upon the defendant, payable to the plaintiff. The first question is, whether this is a cash draft, or inland bill of exchange; if it is, the nature of the draft answers most of the questions which have been discussed. It is not payable to the order of the payee, but that is not essential to make it a bill of exchange. The King v. Box, 6 Taunt. 325. The parties are all specially named, the drawer, the drawee, and the payee. The draft is payable at a time fixed, to wit, on demand; on no contingency or condition, but absolutely; for a sum certain, out of no special fund, but by the drawee generally. The fact, that the draft indicates a debt due to the drawer as the consideration, between drawer and drawee, does not make it the less a cash order or draft. The drawee, by his acceptance, admits such debt, and is estopped to deny it, as against the payee. It seems to us, therefore, that this document possesses the characteristics of a cash draft, and upon a general acceptance thereof, which may be by parol, binds the drawee to the holder. The acceptor has no right to require proof of consideration, as between the drawer and the payee; the draft itself is proof of the holder's title. The statement of the origin of the debt, the purchase of a wagon, did not make it the less payable absolutely, and at all events, and not conditionally or out of a particular fund. Hausoullier v. Hartsinck, 7 Term R. 733. * * *

Exceptions overruled.

[24] Part of the case relating to another point is omitted.

MABIE v. JOHNSON.

(Supreme Court of New York, General Term, 1876. 8 Hun, 309.)

BOARDMAN, J. This action was brought upon a negotiable promissory note as follows:

"Guilford, Nov. 29, 1870.

"For one Hinckley knitting machine, warranted, I promise to pay J. H. Wells or bearer thirty dollars one year from date with use.

"Daniel Johnson."

This note was transferred for value to the plaintiff, before it became due, without any knowledge of the transaction out of which the note arose, except what is contained therein, nor did the plaintiff have any notice or reason to suspect that the defendant had any defense to said note.

Upon the trial before the justice, the defendant offered to prove a parol warranty of the machine in certain respects, with a view of showing a breach of said warranty, and recouping the damages. This evidence was rejected. The county court held that such decision was erroneous upon the ground that the word "warranted" in the note was sufficient notice of the defendant's equities to put the plaintiff upon inquiry as to the terms of the warranty, and that he took the note subject to all damages sustained by the defendant for a breach of such warranty; that the plaintiff stood in no better situation in this respect than the payee would have done, had he brought suit on the note.

I think the learned county judge is in error in the view he took of the case, and that within the authorities the plaintiff was a bona fide holder of the note in suit, so as to deprive the defendant of his defense. The progress of the law on this subject is given in 1 Parsons on Bills, 258 et seq. The result of the English decisions is there laid down to be "that the holder of negotiable paper does not lose his rights by proof that he took the paper negligently." That notice of facts which would defeat his recovery must not be ambiguous. The same doctrine is maintained in the American courts. Welch v. Sage, 47 N. Y. 143, 7 Am. Rep. 423; Magee v. Badger, 34 N. Y. 247, 90 Am. Dec. 691; Belmont Bank v. Hoge, 35 N. Y. 65; Lord v. Wilkinson, 56 Barb. 593, and the cases cited. In Magee v. Badger, supra, Porter, J., says: "He, the purchaser, is not bound, at his peril, to be upon the alert for circumstances which might probably excite the suspicions of wary vigilance. He does not owe the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith." In Lord v. Wilkinson, supra, and Raphael v. Bank of England, 17 C. B. 161 (s. c., 33 Eng. L. & Eq. 276), actual notice of the theft of the securities was given, yet it was held that the forgetting, or omitting to look for the notice, was not

evidence of mala fides. More than negligence must be proved; fraud, mala fides, must be shown.

These cases seem to me to sustain the position of the justice upon the trial. The words, "for one Hinckley knitting machine, warranted," express the consideration of the note. Giving to the words the broadest meaning possible, they do not imply that there has been a breach of the warranty, by which the defendant has sustained damages. They cannot be construed as notice to the purchaser, of a defense to the note in the hands of the payee. If they do, it must be because the law will presume a breach wherever there is a warranty. That would be preposterous. There was nothing, therefore, which showed, or tended to show, to the purchaser, or even to excite his suspicions, that any defense to the note in suit existed, when he purchased it. He is therefore entitled to protection against defendant's counterclaim.

It follows that the judgment of the county court should be reversed, and that of the justice be affirmed, with costs.

TITLOW v. HUBBARD.

(Supreme Court of Indiana, 1878. 63 Ind. 6.)

NIBLACK, J. Erastus W. Hubbard brought this action against Aaron Titlow and Sophia J. Titlow, his wife, to foreclose a mortgage on certain real estate.

The complaint averred that the said Aaron Titlow, on the 20th day of April, 1871, executed to the said Hubbard his promissory note for the sum of $2,500, payable on or before the 20th day of April, 1875, with 10 per cent. interest, to be paid annually, and reasonable attorney's fees, and without relief from valuation laws, and that, to secure the payment of said promissory note, the defendants executed, on the same day, a mortgage on certain real estate, specifically described in said mortgage, copies of which said note and mortgage were filed with the complaint.

The complaint also averred that said note was due and remained unpaid.

Wherefore judgment was demanded against the said Aaron Titlow, upon said note, and against both of the defendants, for the foreclosure of said mortgage.

Aaron Titlow demurred to the complaint, for want of sufficient facts, but his demurrer was overruled. Sophia J. Titlow made default.

The court trying the cause made a finding for an amount as due upon the note for principal, interest and attorney's fees, and ren-

dered judgment for said amount against the said Aaron Titlow, and against both the defendants for a foreclosure of the mortgage.

Upon the assignment of errors upon the record, the first question which arises, in its natural order, is that of the sufficiency of the complaint.

The copy of the note, filed with the complaint, was as follows:

"$2,500. Delphi, April 20, 1871.

"On or before the 20th day of April, 1875, I promise to pay E. W. Hubbard or order the sum of twenty-five hundred dollars, with ten per cent. interest, payable annually, and attorney's fees if prosecuted for collection thereof, waiving valuation laws in the collection thereof, subject to certain conditions contained in a written agreement of this date between parties hereto. A. Titlow."

This note, as it is called, shows upon its face that it was but one of two instruments in writing, which together constituted one entire agreement between the parties concerning the payment of the money to which it relates. The plain inference, from its language, is that this other agreement in writing between the parties, to which it refers, constituted as much a portion of the foundation of the action as did the note itself. This other agreement in writing, or a copy of it, ought, therefore, also to have been filed with the complaint. 2 Rev. St. 1876, p. 73, § 78; also note 1 on the same page; Stafford v. Davidson, 47 Ind. 319.

It is an essential requisite of a promissory note that there must be certainty as to the fact of payment. It must be payable at all events, and not dependent upon a condition or contingency. Chitty, Bills, 134; 1 Parsons, Notes & Bills, 42.

The obligation, therefore, above set out, is not technically a promissory note, but an agreement, in writing, to pay money, subject to certain conditions which are not contained in the instrument itself, and which are not disclosed by any averment of the complaint.

Such an instrument, standing by itself and unaided by suitable explanatory averments, did not, we think, constitute a sufficient foundation for an action. It was, by its terms, too indefinite and uncertain to authorize a demand of judgment upon it.

In any view which we are able to take of the complaint, it appears to us to have been bad upon demurrer.

As the judgment will have to be reversed, for want of a sufficient complaint, it is unnecessary for us to review any of the proceedings subsequent to the overruling of the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

NICHOLS v. RUGGLES.

(Supreme Judicial Court of Maine, 1884, 76 Me. 25.)

Replevin of a horse, brought against a constable who had attached it as the property of James Newcomb, on a writ in favor of C. K. Johnson. The plaintiff claimed title under the following instrument: "Bangor, Sept. 8, 1882. I, James Newcomb, of Carmel, Maine, bought of Lemuel Nichols, Bangor, Maine, one black horse, name Nig, 7 years old, for ($80.00) eighty dollars and interest on same until paid for, which I agree to pay out of my next quarter's mail pay, which becomes due Jan. 1, 1883, on route 184 from Carmel to Kenduskeag, which he is now carrying. The above horse is to remain said Nichols' until fully paid for. James Newcomb." [25]

DANFORTH, J. The only question presented by the report in this case is whether the instrument under which the plaintiff claims title to the horse replevied should have been recorded under Rev. St. c. 111, § 5. If so, the plaintiff fails in his title and in his action.

The statute provides that "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property."

It is conceded that the instrument comes within the statute description in every respect except that it does not contain the note therein required. The objections are that the price to be paid was not payable in money and that its payment depended upon a contingency. But an examination will show that neither of these objections are well founded.

The statute uses the word "note" only, omitting the qualifying adjective "promissory," and whether the construction is to be so limited as to apply only to such promissory notes as are recognized by the commercial law, with all the requisites required by that law, may well be doubted. It is certain that the term "note" without the qualification is often used in a more extensive sense than with it, and it is equally certain that when used to express a promise to pay, whether in property or money, it is equally within the mischief to be prevented.

In this case, however, the promise is both absolute and to pay in money. There is no condition attached to it and the amount is fixed and definite. It is said that it is to be paid from a particular fund. This may be true; but it is evident that the intention of the parties was that its payment was not to be confined to that fund, but that it was to be paid whether the fund should fail or otherwise. Besides

[25] Arguments of counsel are omitted.

there is nothing in the instrument indicating any uncertainty or contingency as to the fund; and if there were it would not render the promise contingent. Story on Prom. Notes, § 26; Bryam v. Hunter, 36 Me. 217; Redman v. Adams, 51 Me. 429. The fund is established by contract and is more than sufficient to pay the amount promised. The service by which it is to be produced was to be rendered by the promisor and if he fails to perform the service there can be no pretense that such failure would relieve him from the obligation of his promise which is unconditional in its terms. Sears v. Wright, 24 Me. 278.

The promise is also to pay in money. The promise to perform the service under the contract for carrying the mail is one thing; that to pay for the horse another and a very different thing. The former is for service to be performed; the latter for a definite amount and no words to indicate that it is to be paid in anything but money.

Judgment for the defendant and for a return of the horse replevied.

SIEGEL, COOPER & CO. v. CHICAGO TRUST & SAVINGS BANK.

(Supreme Court of Illinois. Jan. 21, 1890. 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51.)

SHOPE, C. J. This was an action of assumpsit, by appellee, against appellants, upon the following instrument:

"$300.00 Chicago, March 5, 1887.

"On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size ——— x ——— inches, one end of each of 159 street-cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887. Siegel, Cooper & Co."

—which was indorsed by Dalziel, the payee, to appellee, for value, on the day of its execution.

The first question presented is, is this instrument negotiable? And this question has been answered affirmatively by the circuit and appellate courts. The appellate court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance granted by that court.

It appears that, before the time when the privilege of advertising was to commence, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellant; and it is insisted that the instrument is a simple contract, only, and that therefore the same defense—failure of consideration—is available against the indorsee of the paper for value, and before due, as might be interposed against such paper

in the hands of the payee. It is also insisted that the instrument shows, on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsees took it with notice, and, by the failure of the payee to perform the condition, no right of recovery exists in the indorsee.

It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated; that is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and, in this instance, amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. Daniel, Neg. Inst. §§ 790–797; Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461; State Nat. Bank v. Cason, 39 La. Ann. 865, 2 South. 881; Bank v. Michael, 96 N. C. 53, 1 S. E. 855; Goodloe v. Taylor, 10 N. C. 458; Stevens v. Blunt, 7 Mass. 240.

In State Nat. Bank v. Cason, supra, it is said: "Plaintiff received the note before maturity, and before a failure of the consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and payee. It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from some contingency, it may never be enjoyed."

The most that can be said of a recital in the instrument itself of the consideration upon which it rests is that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient, of itself, to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice. Henneberry v. Morse, 56 Ill. 394. The case at bar does not, however, fall within the rule just

stated, for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following, an interval of 70 days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is that, where the parties insert a specific date of payment, the instrument is then payable at all events, and this although, in the same instrument, an uncertain and different time of payment may be mentioned, as that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like. McCarty v. Howell, 24 Ill. 341, and authorities, supra. But the doctrine of this and kindred cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked, for the time of payment in the instrument under consideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability and render the instrument a mere agreement, yet under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here the money was payable, absolutely on the 1st day of July, 1887, a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired.

No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as no-

tice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be that the contract would be carried out in good faith and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. Wade on Notice, § 94a; Loomis v. Mowry, 8 Hun, 312; Davis v. McCready, supra.

It is also contended that the court erred in giving the eighth instruction in behalf of appellee, as to the meaning of the words "good faith." Without pausing to discuss the instruction, we think it clear that appellants were not prejudiced thereby, and that no inference unfavorable or prejudicial to them could have been drawn therefrom by the jury. While, therefore, the instruction may be regarded as inaccurate, it worked no injury, and appellants cannot complain. See Comstock et al. v. Hannah, 76 Ill. 530.

Other minor objections are urged, which, it is sufficient to say, we have examined with care, but we find no prejudicial error.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.[26]

FIRST NAT. BANK OF HUTCHINSON v. LIGHTNER.

(Supreme Court of Kansas, 1906. 74 Kan. 736, 88 Pac. 59, 8 L. R. A. [N. S.] 231, 118 Am. St. Rep. 353.)

The court made the following special findings of fact and conclusions of law:

"That the Snyder Planing Mill Company entered into a contract with the defendant, Lightner, for the erection of a certain barn at the contract price of $3,500. That prior to the completion of said barn, and on September 28, 1903, the Snyder Planing Mill Company was duly adjudicated bankrupt, and the defendant, Lightner, was compelled to and did complete the barn.

"That prior to the adjudication of the Snyder Planing Mill Company as bankrupt, at the request of said company, Lightner accepted two orders, one for $1,000 and one for $1,500 which said orders and acceptances were identical with the exception of the amounts and dates. The one for $1,500 reads as follows:

[26] Accord: McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265 (1907).

" 'Hutchinson, Kansas, Aug. 10, 1903.

" 'G. W. Lightner, Offerle, Kansas—Dear Sir: Pay to the order of the First National Bank of Hutchinson, Kansas, on account of contract between you and the Snyder Planing Mill Co. $1,500.

" 'The Snyder Planing Mill Co.,

" 'Per J. F. Donnell, Treas.

' 'Accepted. G. W. Lightner.'

"Said two orders, so accepted, were by the Snyder Planing Mill Company hypothecated with the First National Bank of Hutchinson, Kan., to secure two certain demand notes drawing 10 per cent. interest and of even amounts with said orders; the $1,000 order being hypothecated about August 22, 1903, and the $1,500 order on or about August 11, 1903. That the proceeds of said notes were at said dates duly received from said bank, and used by the Snyder Planing Mill Company. Said notes are still due and unpaid.

"The said orders were so accepted by Lightner on or about August 10, 1903, and that about September 30th Lightner took up the $1,000 order by giving therefor his check for $1,000 to the cashier of plaintiff, which was as follows:

" 'Kinsley, Kansas, Sept. 30, 1903.

" 'The National Bank of Kinsley: Pay to E. W. Eagan, cashier, or order, $1,000.00. One thousand dollars.

" 'George W. Lightner.'

"That said Lightner stopped payment on said check prior to its presentation, and no part thereof has been paid, nor has any part of the $1,500 order been paid. That, prior to the giving of the two orders, Lightner paid the Snyder Planing Mill Company $1,000 upon said contract, and that he was compelled to expend $1,624.04 to complete the barn. That there was a balance due and unpaid on said contract of $872.96 when this action was commenced.

* * * * * * * * * * *

"First. That said orders were nonnegotiable, and were subject to the same defenses in the hands of the First National Bank of Hutchinson, Kan., as if they had remained in the hands of the Snyder Planing Mill Company.

"Second. That the plaintiff is entitled to judgment in this action in the sum of $970 with interest from this date at 6 per cent. per annum and for costs. Chas. E. Lobdell, Judge."

Plaintiff brings the cause here upon a transcript, and alleges error in the conclusions of law upon which the judgment is based and error in overruling the motion for a new trial.[27]

PORTER, J. (after stating the facts as above). The main controversy is whether the orders given by the planing mill company to the bank, and accepted by defendant, are negotiable instruments. It is true that no specific time of payment is mentioned, but that does not affect

[27] The statement of the case is abridged.

their validity as such instruments, and, where no date is mentioned, they are payable on demand. 4 A. & E. Enc. of Law (2d Ed.) 133 and note 3; Douglass v. Sargent & Bro., 32 Kan. 413, 4 Pac. 861. Each of them, therefore, possesses all the essential elements of a bill of exchange unless the words quoted make them payable out of a particular fund and conditionally so that the acceptance is thereby qualified. The law is well settled that a bill or note is not negotiable if made payable out of a particular fund. 1 Daniel on Neg. Inst. (5th Ed.) § 50; White v. Cushing, 88 Me. 339, 34 Atl. 164, 32 L. R. A. 590, 51 Am. St. Rep. 402. But a distinction is recognized where the instrument is simply chargeable to a particular account. In such a case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement. 1 Daniel on Neg. Inst. (5th Ed.) § 51; Tiedeman on Bills & Notes, § 20. In Ridgely Bank v. Patton et al., 109 Ill. 479, it is said: "A bill or note, without affecting its character as such, may state the transaction out of which it arose, or the consideration for which it was given." "So, also, the insertion into a bill or note of memoranda, explaining the nature of the business or debt, for which the instrument is given, will not make it nonnegotiable, for such a memorandum does not make the payment conditional." Tiedeman on Com. Paper, § 26.

The test in every case is said to be: "Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund?" 4 A. & E. Enc. of Law, 89. A promise to pay a certain sum "out of my next quarter's mail pay, which becomes due January 1, 1883," was held in Nichols v. Ruggles, 76 Me. 25, to be an absolute promise to pay a certain sum of money. In Haussoullier against Hartsinck, 7 Term R. (Durnford & East), 733, it was held that an instrument promising to pay a certain sum "being a portion of a value, as under deposit in security for the payment hereof," was a promissory note payable at all events. In Pierson v. Dunlop, 2 Cowp. 571, an order which was to be charged "to freight" was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable. Bank v. Michael, 96 N. C. 53, 1 S. E. 855. Likewise a note which stated that it was given in consideration of certain personal property, the title of which was not to pass unless the note was paid. Chicago Railway Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

This court held in Clark v. Skeen, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337, that "a note for the payment of a certain sum at a fixed date is not rendered nonnegotiable by a stipulation that, upon default in the payment of interest, the whole amount shall become due at the option of the holder, and then draw a greater rate of interest." In Corbett v. Clark and Another, 45 Wis.

403, 30 Am. Rep. 763, an order to pay a certain sum "and take the same out of our share of the grain," referring to grain harvested or growing on certain farms, accepted by the drawee, was said to be a valid bill of exchange, and the order and acceptance absolute, the words above quoted merely indicating the means of disbursement. In Redman v. Adams, 51 Me. 429, a bill directing the drawee to charge the amount against the drawer's share of fish caught on a certain schooner is held valid and negotiable.

One of the leading cases is Macleed v. Snee, 2 Str. 765. There a bill of exchange was dated May 25th for the payment of a certain sum one month after date, "as my quarterly half-pay to be due from 24th of June to 27th of September next, by advance." This was held a negotiable bill of exchange. In Spurgin v. McPheeters, 42 Ind. 527, an instrument in the following form was said to possess all the requisites of a bill of exchange: "Greencastle, Ind., Aug. 22d, 1870. Mr. D. M. Spurgin—Sir, please pay to Jesse McPheeters, or order, the sum of one hundred and nineteen dollars on said bill of 1¾ in. lumber, and oblige the firm of Geo. W. Hinton & Co." In Whitney v. Eliot National Bank, 137 Mass. 351, 50 Am. Rep. 316, the drafts or bills of exchange were in the ordinary form except that they contained the direction to "charge the same to account of 250 bbls. meal ex schooner Aurora Borealis." The court said: "This direction to charge the amount of the bills to a particular account, we think, does not make them payable conditionally, or out of a particular fund; they are still payable absolutely, and are negotiable, and do not constitute an assignment of a particular fund, or of a part of a particular fund. * * * Macleed v. Snee, 2 Str. 762; Redman v. Adams, 51 Me. 429; Corbett v. Clark, 45 Wis. 403, 30 Am. Rep. 763; Coursin v. Ledlie, 31 Pa. 506; Spurgin v. McPheeters, 42 Ind. 527."

The rule with regard to words which refer to the consideration is well stated in Siegel et al. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51, as follows: "The mere fact that the consideration for which a promissory note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract, or promise on the part of the payee, will not destroy the negotiability of the note, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid." The following authorities are also in point: Matthews v. Crosby, 56 N. H. 21; Shepard v. Abbott, 137 Mass. 224; Id., 179 Mass. 300, 60 N. E. 782; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Hillstrom v. Anderson, 46 Minn. 382, 49 N. W. 187; Bank of Kentucky v. Sanders & Wier, 3 A. K. Marsh. (Ky.) 184, 13 Am. Dec. 149; 4 A. & E. Enc. of Law, 89; 7 Cyc. 580.

Our negotiable instrument law (chapter 70, § 10; Gen. St. 1905, § 4542), which is merely declaratory of the common law upon the subject reads as follows: "When promise is unconditional. An unqualified order or promise to pay is unconditional, within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument; but an order or promise to pay out of a particular fund is not unconditional." Plaintiff and defendant agree upon the abstract proposition of law involved in the controversy. Counsel for defendant concedes that an instrument, negotiable in itself, is not changed in character, or rendered nonnegotiable "by a recital of the consideration or a direction as to how the drawee shall reimburse himself," but insists that the insertion of the words "on account of" has the same effect as the words "out of the proceeds of." The controversy is thus narrowed down to whether the words "on account of contract between you and the Snyder Planing Mill Co." amount to a direction to pay out of a particular fund, or, on the other hand, are to be considered as simply indicating the fund from which the drawee, Lightner, might reimburse himself.

Many of the cases attach but little importance to the words "account of," and give the same effect to them as to the words "out of." 7 Cyc. 579. In the case of Pitman v. Breckenridge & Crawford, 3 Grat. (Va.) 127, cited by defendant, the phrase, "on account of brick work done," on a certain building, was held to be a direction to pay out of a particular fund. The case itself is of little value as an authority; it cites no cases, gives no reason, and simply holds the bill nonnegotiable. The language in Brill et al. v. Tuttle, 81 N. Y. 454, 457, 37 Am. Rep. 515 ("and charge the same to our account for labor and materials performed and furnished"), was held to be ambiguous, and other circumstances were considered as controlling. The bill was held not negotiable. The following order was held not negotiable, in Conroy v. Ferree, 68 Minn. 325, 71 N. W. 383, but the opinion merely states that the order is drawn upon a special fund without any discussion of the reasons: "Starbuck, Minn., Sept. 14, 1895. T. E. Thompson and C. L. Brevig—Pay to the order of A. G. Englund one hundred fifty dollars ($150.00) on earnings for the threshing season of 1895, whatever they may be, and charge to the account of A. H. Ferree. $150.00. Accepted Sept. 14, 1895. By C. L. Brevig."

We are of the opinion that these orders cannot be construed as drawn upon a particular fund. Beyond question, there are many authorities which hold similar expressions to indicate an intention to

charge a particular fund. See Banbury v. Lisset, 2 Str. 1211; Averett's Adm'r v. Booker, 15 Grat. (Va.) 163, 76 Am. Dec. 203; Rice v. Porter's Adm'rs, 16 N. J. Law, 440; 7 Cyc. 578 (b). The weight of authority and reason supports the proposition that the words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read "and charge to account of contract with Snyder Planing Mill Company," or "credit to account of contract," etc. The $1,000 check we consider in the same light as the order for which it was substituted.

Defendant in error argues that certain collateral circumstances appearing in the evidence must be taken into consideration; among other things, the fact that the bank held these orders for a time after their execution as indicating the intention with which the orders were taken. It is argued that there being an ambiguity in the language, we must consider the construction placed upon these orders by the parties themselves. This case is here upon a transcript which contains none of the evidence, merely the pleadings, findings of fact and of law, the judgment and motion for a new trial. Had the trial court rested the decision upon the existence of these outside matters the findings of fact, which are very complete, would doubtless have referred to them. The conclusions of law are so framed as to leave no doubt that the court held the instruments to be nonnegotiable on account of the language used in the instruments themselves. In our view they were negotiable and the language, moreover, not even ambiguous. It follows that defendant was not entitled to recoup his damages for the failure to complete the barn; and the findings of the court, therefore, require a judgment for plaintiff for the amount due upon the order, and the $1,000 check.

The cause will, therefore, be reversed and remanded, with directions to enter judgment in favor of plaintiff. All the Justices concurring.[28]

[28] See Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782 (1901); Waddell v. Bank, 48 Misc. Rep. 578, 97 N. Y. Supp. 305 (1905).

In Bavins v. London, etc., Bank, [1900] 1 Q. B. 270, 275 (C. A.), the following instrument was held not to be a check because conditional:

"The Great Northern Ry. Co.

"No. Accountants' drawing account. London, July 7, 1898.

"The Union Bank of London, Limited, No. 2 Princes St., Mansion House, E. C.: Pay to J. Bavins Jr. and Sims the sum of 69 pounds 7 s. provided the receipt at foot hereof is duly signed, stamped and dated. £69–7.

"[Signatures.]

"Received from Great Northern Ry. Co. the above named sum as per particulars furnished. This receipt is not to be detached from the cheque.

"[Signature] ————.

"Dated ———, 189—."

A. L. Smith, L. J., said: "In my opinion Kenedy, J., was quite right in holding that this order was not a check within the definition given by the

(II) As to Certainty

AYREY v. FEAMSIDES.

(Court of Exchequer, 1838. 4 Mees. & W. 168.)

Debt on an instrument (declared on as a promissory note) whereby the defendants jointly and separately promised to pay to the plaintiffs, or order, the sum of £13. on demand, for value received, with interest at £5. per cent., "and all fines according to rule." There was also a count on an account stated. The defendant pleaded to the first count, payment; to the second, nunquam indebitatus; and at the trial, before the undersheriff of Yorkshire, the plaintiff had a general verdict.

W. H. Watson having obtained a rule nisi to arrest the judgment, on the ground that the instrument declared on could not be considered as a promissory note within the statute, but only as an agreement, for which no consideration was shown in the declaration.

Wightman showed cause. The words, "and all fines according to rule," are altogether insensible, and may be rejected as surplusage; their presence, therefore, does not vitiate the instrument, which, in all other respects, is a complete promissory note. It was certainly held in Smith v. Nightingale, 2 Stark. N. P. 375 (which appears to be the nearest case to the present), that an instrument whereby the party promised to pay a sum certain, "and also all other sums that might be due," was not a promissory note within the statute. But there, the last words, although not capable of any definite construction, were not so insensible as that they could be rejected as surplusage, since they

Bills of Exchange Act, 1882, § 73, because it was not an unconditional order in writing for the payment of money within section 3, subsec. 1, of that act."

In Nathan v. Ogdens, 93 L. T. R. (N. S.) 553 (1905), the following instrument was held to be an unconditional order, and to be a check:

"Second and Final Bonus Distribution.

"Liverpool, November 10, 1902.

"The Lancashire and Yorkshire Bank, Limited: Pay Mr. H. Nathan or order one hundred and twenty-six pounds five and five pence.

Ogdens, Limited (in liquidation),
"p. pro. Joseph Hood, Liquidator.
"[Signed] Oswald Clement.

"The receipt at back hereof must be signed, which signature will be taken as an indorsement of this check."

On the back of the check:

"November, 1902.

"Received from Mr. Joseph Hood (liquidator of Ogdens, Limited), this check for £126. 5s. 5d., being my share of the second and final bonus distribution of the company. [Signed] H. Nathan.

"H. J. Nathan."

A. T. Lawrence, J., said: "I think the check was a negotiable instrument, notwithstanding the words above quoted at the foot thereof. I think the order to pay is unconditional, and that, though the words at the foot of the check are imperative in terms, they are not addressed to the bankers, and do not affect the nature of the order to them."

showed that some more money was due, only they did not specify the amount with sufficient precision. But here, the words do not import any promise to pay money; and there is nothing to show what they have reference to, or what is the nature of the fines spoken of. Besides, the instrument must be either a promissory note or an agreement at common law; and it clearly is not the latter: for the words in question have no intelligible meaning in themselves, neither could evidence be admitted to explain them aliunde, if they were declared on as a contract.

Watson in support of the rule. It does not follow that, because the precise amount or even nature of the fines referred to is not specified, the words can be rejected as surplusage. If any construction can by possibility be put upon them which can make them sensible, they cannot be rejected; and it is plain that they may refer to money due for pecuniary forfeitures, as, for instance, for violation of the rules of a benefit society, of which the parties were members. Smith v. Nightingale is directly in point. There Lord Ellenborough says: "The instrument is too indefinite to be considered as a promissory note, for it contains a promise to pay interest for a sum not specified, and no otherwise ascertained than by reference to the defendant's books; and, since the whole constitutes one entire promise, it cannot be divided into parts." So here, the instrument contains a promise to pay some amount not specified, and not to be ascertained but by extrinsic evidence.

PARKE, B. This instrument being declared on as a promissory note, the question is, whether the words, "and all fines according to rule," can be rejected as being altogether insensible, and therefore mere surplusage: and I think they cannot. It is quite possible that they have a meaning, and may import that certain pecuniary fines or forfeitures are to be paid by the defendants; and if so, this is certainly no promissory note within the statute, but is a specific agreement to do certain things, the consideration for doing which not being stated, the declaration is clearly bad. The judgment will not, however, be arrested altogether but on the authority of Leach v. Thomas, 2 Mees. & W. 427, which was confirmed this morning by the whole court in the case of Corner v. Shew, 4 Mees. & W. 163, a venire de novo must be awarded.

Rule accordingly.

LOWE v. BLISS.

(Supreme Court of Illinois, 1860. 24 Ill. 168, 76 Am. Dec. 742.)

This was an action in assumpsit. Declaration filed December 4th. Counts: (1) On a promissory note of plaintiff in error (defendant below), dated July 28, 1858, made at New York, promising "to pay

Geo. Bliss & Co." (defendants in error), "plaintiffs, the sum of two hundred and twenty-two and 47/100 dollars, with the current rate of exchange on New York, for value received, in ninety days after the date thereof," alleging nonpayment. (2) The common counts for goods sold, money lent, had and received, and an account stated.

With declaration, copy of note sued on, as follows:

"222.47. New York, July 28, 1858.

"Ninety days after date, I, the subscriber, of Aroma, county of Kankakee, state of Illinois, promise to pay to the order of George Bliss & Co., two hundred twenty-two and 47/100 dollars, at the Kankakee Bank, Kankakee, Ill., value received, with current rate of exchange on New York. David N. Lowe."

Defendant pleaded the general issue.

The issue was tried by the court, jury waived, and finding for plaintiffs below, for $227.28.

Motion for new trial overruled, and judgment for verdict and costs, and 30 days given to file bill of exceptions.[29]

WALKER, J. * * * The question is then presented whether this instrument was admissible under the common counts without proving a consideration. Promissory notes, bills of exchange, and sealed instruments, all import a consideration, and when they form the basis of an action, a consideration need neither be averred nor proved, but it is not so with other instruments. This instrument is not under seal, nor is it a bill of exchange. Was it a promissory note? That is defined to be "a promise or agreement in writing to pay a specified sum, at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer." Chit. on Bills, 516. Bayley on Bills, p. 1, defines a promissory note to be a written promise to pay money absolutely and at all events. And in the application of the rule the doctrine seems to be adhered to with entire unanimity, that a note or bill must be for a specific sum, or at least for a sum that may be ascertained by computation, independent of all extrinsic evidence. If an instrument be for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, it would not be a bill or note. Had this promise been for the sum of money named, and for the value of four days' labor, no one would have supposed it to be a promissory note, because proof would have to be resorted to for the purpose of ascertaining the value of the labor, and consequently it would not be for a specified sum of money. Such a promise leaves the sum agreed to be paid wholly uncertain. We know that the current rate of exchange between commercial points is fluctuating, and subject to constant change, depending upon the balance of trade and other causes incident thereto. It is as sub-

[29] The statement is abridged, and a part of the opinion omitted.

ject to fluctuation as the value of labor or the price of grain, cattle, or other articles of property. And it has never been held that a court may judicially fix the price of any of those commodities independent of proof, and yet to do so, would be no more unreasonable than to take judicial notice of the rate of exchange between different commercial places. We are aware of no decision that has ever held that a court may take notice of such facts, nor has any decision been referred to which holds such an instrument to be a promissory note. Nor can it be successfully urged that custom has changed the law and rendered such instruments valid promissory notes. These instruments owe their negotiability and evidence of the receipt of a consideration to the operation of the statute, and not to the common law. Prior to the adoption of the statute of Anne, in Great Britain, and our statute regulating negotiable instruments, they, neither in that country nor in this state, possessed such qualities. And under the British statute they must be for the payment of a certain specified sum of money, and so under our statute, and not mere mutual agreements or covenants to have that effect.

Unless the instrument declared upon possesses all the qualities of a bill or note, or be under seal, if declared upon specially, a consideration must be averred and proved, or if offered under the common counts, it must be proved, to authorize a recovery. This instrument being a simple contract not under seal, and neither a note or bill, is subject to all the rules which are applied to other simple contracts. When it was offered under the common counts, as it imports no consideration, to authorize a recovery, a sufficient consideration should have been proved. When offered under the common counts, it dispensed with no proof that would have been required under a properly framed special count. It, unlike a note or bill, afforded no evidence of either money lent, advanced, or had and received to the use of the plaintiff. * * *

Judgment reversed.

GAAR v. LOUISVILLE BANKING CO.

(Court of Appeals of Kentucky, 1875. 11 Bush, 180, 21 Am. Rep. 209.)

This suit was brought in the Louisville chancery court by appellee against appellants and others on this instrument:

"Louisville, Ky., January 27, 1873.

"Four months after date pay to the order of J. M. Bryant ninety-four hundred and twenty and four hundredths dollars, value received, negotiable and payable at the office of the Louisville Banking Company.

"$9,420.04. [Signed] W. H. Beynroth."

Addressed to Morris, Southwick & Co., Louisville, Ky., accepted by them, and indorsed by J. M. Bryant, H. S. Gaar, P. G. Kelsey, and J. T. Morris. On the back of that paper this agreement appears:

"The drawers, indorsers, and acceptors of this bill agree to pay a reasonable attorney's fee to any holder thereof, if the same shall hereafter be sued upon, and also pay interest at the rate of ten per cent. per annum after maturity until paid, and all are equally bound as drawers, indorsers, as if this bill were in the form of a joint note

"[Signed] Morris, Southwick & Co.
"W. H. Beynroth.
"J. M. Bryant.
"H. S. Gaar."

The first paragraph of the petition declared on it as a bill of exchange.

In the third paragraph, the writing indorsed on the back of the bill was set up, and judgment was prayed thereon for 10 per cent. interest on the amount of the bill from its maturity until paid, and for $500 as an attorney's fee. Gaar and Bryant demurred to the petition; and their demurrer having been overruled they answered, and a trial was had, which resulted in a verdict and judgment against them for the amount of the bill, with interest thereon at 10 per cent. per annum from maturity until paid, and from that judgment they have appealed. [30]

COFER, J. The ground of the demurrer is, that although the writing declared on in the first paragraph when taken by itself is a bill of exchange, the writing indorsed on the back thereof, in which the signers agreed to pay an attorney's fee in case the bill should be sued on, destroyed its negotiability. This argument is based on the fact that the amount of the attorney's fee agreed to be paid was not ascertained, and hence it is contended that the bill was for an uncertain amount.

A bill of exchange has been defined to be a written order or request by one person to another for the payment of a sum of money, absolutely, and at all events; and as bills are designed to take the place and perform the office of money, there must be no chance of mistake as to the amount of money of which they thus take the place. On this point therefore the adjudged cases are quite stringent. The sum must be stated definitely, and must not be connected with any indefinite or uncertain sum. 1 Parsons on Notes and Bills, 37; Story on Bills, §§ 42–45.

It has accordingly been held that an instrument in the form of a note promising to pay a specified sum at a designated place on a named day, "current rate of exchange added," was not a note, because the current rate of exchange was unascertained and uncertain.

[30] The statement of facts is abridged from the statement of Cofer, J. Part of the opinion is omitted.

Atkinson v. Manks, 1 Cow. (N. Y.) 707. And in Davis v. Wilkinson, 10 Adol. & E. 98, it was held that the following instrument was not a note: "I agree to pay to D. £695. at four installments," the first on, etc., "being £200.," and so on, specifying three others amounting in the aggregate to £600. "The remaining £95. to go as a set-off for an order of R. to T., and the remainder of his debt owing from D. to him."

In Cushman v. Haynes, 20 Pick. (Mass.) 133, it was held that an acceptance for an uncertain amount—to wit, "the balance of goods not then sold"—was not negotiable.

Other cases to the same effect might be cited, but it is deemed unnecessary, as the rule of the law merchant undoubtedly is that it is an indispensable quality of a note or bill that it shall be for a definite sum in order that it may be negotiable.

But it by no means follows from this conclusion that the negotiability of the paper sued on was destroyed by the agreement indorsed thereon that the parties would pay an attorney's fee if the debt had to be sued for.

In the cases cited, and others referred to by counsel, the amount to be paid at the maturity of the note or bill was uncertain, and it was that fact which destroyed their negotiability; but in this case the amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due that any uncertainty arose.

The reason for the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it can not be unless it can be ascertained from it exactly how much money it represents. As long therefore as it remains a substitute for money the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated negotiability, or to perform the office of money; and hence anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in no wise affected it until after it had performed its office, can not prevent its becoming negotiable paper. Until the paper in question matured the amount due upon it was fixed and certain, and it might therefore take the place of money; when it became overdue, that fact put an end to its career, and then for the first time the amount to which the holder was entitled became uncertain, or rather might be made uncertain by bringing an action on the bill against the parties who signed the agreement indorsed thereon.

We are therefore of the opinion that the demurrer was properly overruled.[31] * * *

[31] Contra: First Bank v. Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365 (1884); American Machinery Co. v. Druge Bros., 82 Vt. 476, 74 Atl. 84 (1909).

The act of March 14, 1871, which made it lawful to contract in writing for any rate of interest not exceeding 10 per cent., was in force when the bill sued on was made. A part of the fifth section of that act, which is nearly the same as section 4 of article 2 of chapter 60 of the General Statutes, is in these words: "If any rate of interest exceeding the rate authorized by the first section of this act (ten per cent.) shall be charged the whole interest shall be forfeited." It is claimed by the appellants that as the bill was to bear 10 per cent. interest after maturity, and in addition thereto the bank took their obligation to pay an attorney's fee in the event suit was brought on the bill, the bank contracted for a rate of interest exceeding 10 per cent., and thereby forfeited all right to any interest, and that the judgment for interest is therefore erroneous.

Waiving the question whether the repeal of the statute then in force operated to relieve the appellant from the forfeiture denounced by that section, we are of the opinion no such forfeiture was incurred.

This objection to the judgment raises the question whether the agreement to pay an attorney's fee can be regarded as an agreement to pay a rate of interest exceeding ten per cent. Interest is the premium allowed by law for the use of money, while usury is the taking of more for the use of money than the law allows.

If therefore the agreement to pay an attorney's fee in case the bill had to be sued on can be regarded as the taking or contracting for more than 10 per cent. for the use of the money loaned on the bill it is usurious, and the bank thereby forfeited its right to any interest.

But we do not regard such a contract as an agreement to pay usury; it was an agreement to pay a penalty in default of payment of principal and lawful interest at maturity, or before suit. Whenever the debtor, by the terms of his contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day the contract is not usurious, but the difference between the two sums is a penalty. Blydenburg on Usury, p. 39; Cutlen v. How, 8 Mass. 257; Moore v. Hylton, 16 N. C. 429; Tyler on Usury, 97; Jordan v. Lewis, 2 Stew. (Ala.) 426.

But when he cannot discharge his contract according to its terms at maturity by the payment of the debt and lawful interest the contract is usurious.

In this case the contract might have been discharged according to its terms at any time before suit was commenced by the payment of the principal and lawful interest, and it results therefore that the forfeiture denounced by the statute was not incurred.

We have been referred by counsel to the case of Thomasson v. Townsend, 10 Bush, 114, as holding that such an agreement is usurious. Speaking of the agreement to pay an attorney's fee in the event the mortgage was foreclosed, the court said: "It is in the nature of a penalty to be imposed in case the mortgagor should fail

to pay off and satisfy the mortgage debt before judgment." It was also said that "such contracts are in their nature usurious." But when the whole opinion is considered together it is clear that the court did not regard the contract as usurious in fact or in law, but as a penalty merely; for it is said that, while if the debtor resists its enforcement, the court will relieve against it as a penalty; yet "when a judgment is rendered by default in a case like this, upon a petition setting out the contract in accordance with the rules of pleading, the defendant will be without remedy. This is the extent of the rule intimated in the opinion in Smith v. Kahn & Will (MS. opinion, November 7, 1871). In this case the defendant was in court resisting the enforcement of the penalty."

The court not only treated it as a penalty and called it by that name, but said if judgment was allowed to go by default upon appropriate pleading the defendant would be without remedy, which can never be the case when the record shows that judgment has been rendered for usury. There is therefore nothing in the opinion in that case inconsistent with the conclusion reached in this case, but on the contrary that opinion is an authority in support of it.[32] * * *

Judgment affirmed.

SMITH v. CRANE.

(Supreme Court of Minnesota, 1885. 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20.)

Plaintiff, as indorsee for value and before maturity, brought this action in the municipal court of Mankato upon the promissory note set out in the opinion. The answer denies that the note is negotiable, denies that plaintiff is the holder and owner of the note, denies that it was transferred before maturity, alleges that it was given, with two other notes, in payment for a harvester and binder which was accompanied with a written warranty, alleges a breach of the warranty and a return of the harvester and binder in accordance with the provisions of the warranty, and asks that the damages for the breach be set off against the note. * * *

The court also charged, against plaintiff's objection, that "the instrument offered in evidence (the note in suit) is not a promissory note, but is subject to all equities existing between the defendant and D. M. Osborne & Co., whether it was assigned before or after maturity." Defendant had a verdict, and plaintiff appeals from an order refusing a new trial.[33]

[32] Contra: First Bank v. Larsen, *supra;* Young v. Bank (Tex. Civ. App.) 117 S. W. 476 (1909). But the plaintiff must prove the amount of his counsel fees.

[33] The statement is abridged, and a part of the opinion omitted.

BERRY, J. "$100. Good Thunder, July 24, 1882. For value received on or before the first day of January, 1884, I, or we, or either of us, promise to pay to the order of D. M. Osborne & Co. the sum of one hundred dollars, at the office of Gebhard & Moore, in Mankato, with interest at ten per cent. per annum from date until paid; seven, if paid when due. W. J. B. Crane." A negotiable promissory note must be certain as to amount. Jones v. Radatz, 27 Minn. 240, 6 N. W. 800. It is so certain when the sum to become absolutely payable upon it at any given time is ascertainable upon its face. 1 Daniel, Neg. Inst. § 53; Towne v. Rice, 122 Mass. 67; Jones v. Radatz, supra.

The defendant's position is that the foregoing instrument is rendered uncertain as to amount by the interest clause, and therefore is not a negotiable promissory note. As to the legal effect of such a clause the authorities disagree. Some hold that the contract reserves the higher rate of interest, with a provision for its abatement, upon a condition to be performed, and that, therefore, the difference between the two rates is not a penalty, but the contract is to be enforced according to its literal terms. The cases holding this view rest upon Nicholls v. Maynard, 3 Atk. 519. See Walmesley v. Booth, Barn. Ch. 478, 481; Bonafous v. Rybot, 3 Burr. 1370; Waller v. Long, 6 Munf. (Va.) 71. Other authorities hold that the clause is the same in effect as if it had reserved the lower rate of interest, with a provision that if the indebtedness is not paid at maturity, interest shall run at a higher rate. Seton v. Slade, 7 Ves. 265. And see Stanhope v. Manners, 2 Eden, 197; Brockway v. Clark, 6 Ohio, 45; Longworth v. Askren, 15 Ohio St. 370; Brown v. Barkham, 1 P. Wms. 652. If this be the true construction of the clause, it is generally agreed that the difference between the two rates is to be treated as a penalty. Talcott v. Marston, 3 Minn. 339 (Gil. 238); Newell v. Houlton, 22 Minn. 19; and cases last cited.

In our opinion the view taken by the authorities last mentioned, as to the legal effect of the interest clause under consideration, is the more sensible, and most in accordance with what would seem to be the real object of the parties to the contract. What the payee really wants is his money at the due date of the contract, and to secure this he holds an increase of the rate of interest over the debtor's head. In other words, the increase is a penalty for the debtor's delinquency. Treating the increase as a penalty, it follows, under the decisions of the court before cited, that the note in suit will in law draw the same rate of interest before as after maturity—that is to say, 7 per cent. —and that, therefore (whatever might be the case if the interest clause were upheld according to its literal terms), the sum absolutely payable upon the instrument at any given time is thus made certain as the principal, and 7 per cent. interest. * * *

Order reversed, and new trial granted.

COOKE v. COLEHAN.

(Court of King's Bench, 1744. 2 Str. 1217.)

On error from C. B. a note to pay to A. or order, six weeks after the death of the defendant's father, for value received, was held to be a negotiable note within the statute 3 Anne, c. 9, for there is no contingency, whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight. In Communi Banco it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice WILLES.

EVANS v. UNDERWOOD.

(Court of King's Bench, 1749. 1 Wils. 262.)

Action upon a promissory note brought by Evans the indorsee against Underwood the drawer: The note set out in the declaration is, "I promise to pay to George Pratt, or order, eight pounds, upon the receipt of his the said George Pratt's wages due from his majesty's ship the Suffolk, it being in full for his wages and prize-money, and short allowance money for the said ship;" the indorsement by Pratt is set out, and it is averred that the defendant received the said wages from the said ship. Upon non assumpsit pleaded, the jury gave a verdict for the plaintiff; and now it was moved in arrest of judgment, that this note was not negotiable within St. 4 & 5 Anne, c. 9.

Mr. Hume Campbell for the plaintiff, to show this was a negotiable note cited several cases, and principally relied upon Andrews v. Franklin, which was in Hilary term 3 Geo. I in this court; case upon a promissory note to pay money within two months after the ship called the Devonshire should be paid off, and the plaintiff declared upon the statute; it was there insisted that the note was not negotiable, the promise to pay being upon a contingency which might never happen. Sed PER CURIAM. The paying off the ship was morally certain, and the note is within the statute and negotiable. And in Colehan v. Cooke, Mich. 15 Geo. II in C. B., J. Cooke on 27th of May, 1732, made a promissory note, whereby he promised to pay to H. Denham, or order, £150 six weeks after the death of his father J. Cooke, Esq., for value received, which was indorsed to Colehan; J. Cooke the father died April 2, 1741. And the indorsee brought an action, and had judgment in the Common Pleas, that the note was negotiable after three arguments for their was no contingency whereby the note might never become payable, and was only uncertain as to the time; and the judgment of the C. B. was affirmed upon a writ of error in B. R. Mich. term, 18 Geo. II, and the court said that no certain

precise form of words are necessary to be used in a bill of exchange or note of hand, and that "I promise to be accountable to A. or his order, for £100 value received," would be a good negotiable promissory note.

On the other side it was said by Mr. Ford for the defendant, that the case of Andrews and Franklyn was never determined, and that in the case of Colehan v. Cooke, the payment was certain in all events, for the father must die some time or other, but it was uncertain whether the ship Suffolk would ever be paid off or not.

LEE, C. J. The case of Andrews v. Franklyn is very like the present; we will look into that case and see whether it was determined; the court inclined to give judgment for the plaintiff, and after looking into the case cited, did so, ut audivi.[34]

JONES v. EISLER.

(Supreme Court of Kansas, 1865. 3 Kan. 134.)

This action was brought September 11, 1863, in Franklin county district court, on a note, as follows: "$237.37. Ottawa Creek, April 20th, 1860. For value received (in cutting stone) by Gouliep Anders, I promise to pay when I receive it from government for losses sustained in August, 1856, or as soon as otherwise convenient, the sum of two hundred and thirty-seven dollars and thirty-seven cents. John T. Jones"—which note bore the following indorsements, viz.: "April 9, 1860. Received of the within note twenty dollars." "June 18, 1860. Received of the within five dollars." "Nov. 10th. Received of the within two dollars and fifty cents"—each signed. The

[34] "There is another interesting question in the case, a brief discussion of which may be of service in the conduct of the new trial which we find it necessary to order. Under the decision of the Supreme Court of Illinois in Kelley v. Hemmingway, 13 Ill. 604, it would seem that the instrument upon which the present suit was brought is not a promissory note at all. The instrument there under consideration read as follows: 'Castleton, April 27th, 1844. Due Henry D. Kelley fifty-three dollars when he is twenty-one years old, with interest. David Kelley.' The court held that, inasmuch as the payment was conditioned upon the attainment of his majority by the payee—an event which might never happen—it was made dependent on a contingency, and therefore lacked one of the essential elements of a promissory note, which is that the money shall be certainly payable. This case is cited by Story and Daniel as authority for the proposition that a written promise to pay money when the payee shall come of age is not a good promissory note; 'for non constat that he will ever arrive at that period of life.' Story, Prom. Notes (7th Ed.) § 28; 1 Daniel, Neg. Inst. (4th Ed.) § 46. And we do not find that the correctness of the decision has ever been questioned. Numerous judicial declarations can be cited to the effect that contingency as to payment is fatal to the character of an instrument as a promissory note. As was said by Brown, J., in Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424, 'the agreement to pay must not depend on any contingency, but be absolute and at all events.'" Rice v. Rice, 43 App. Div. 458, 60 N. Y. Supp. 97, 100 (1899).

petition set forth a copy of the note and of the indorsements, setting forth the amount claimed due thereon, and asked judgment.

The answer set up the three-year statute of limitation. A demurrer to the answer was sustained, and the defendant brings error.[35]

CROZIER, C. J. The first question presented by the record is: When did the note sued on become due? The note is not a conditional one. The maker owed the payee who had performed labor for him. He declares in the paper that he has received the consideration, which all must admit was a valuable one. The existence of the debt was not made to depend upon a condition or contingency. Everything necessary to constitute a promissory note, except the time of payment, is clearly expressed. As to the time the language is peculiar. It could not have been contemplated that if Jones never got his money from the government, or never should be in a situation when he could conveniently pay, that the money never was to be payable. Jones evidently expected, within a reasonable time to get money from the government, or failing in that, within a like time, it would otherwise be convenient to pay. After having performed work to the full amount of the note, it could not have been intended that Anders should never get his money unless Jones got his from the government, or should find it otherwise convenient to pay. The intention of the parties doubtless was, that it should in any event be payable in a reasonable time, and such is the legal effect of the instrument.

What was such reasonable time was in this case determined by the parties themselves. A payment was made June 18, 1860, about 60 days after the note was made. The parties considered this a reasonable time, and it would have been so in law in case a formal demand had been made. The payment was equivalent, under the circumstances, to a demand. The money then became due, at least as early as June 18, 1860, at which time the statute of limitation would begin to run. The maker pleaded the statute, which was a good defense, unless there was a subsequent payment or written acknowledgment within three years preceding the commencement of the suit. The petition alleges a payment on the 10th of November, without stating any year. As a matter of fact, a court or jury might infer that it was in 1860, but as a matter of allegation in pleading, the court could not interpolate those or any other figures in pleading; facts must be plainly and concisely stated, not inferentially stated. Had the petition averred a payment on the 10th of November, 1860, the court or jury upon a trial might have been justified in finding as a fact, upon the production of the note with all of the indorsements, that a payment had been made at that time, or parol testimony might have been

[35] The statement is abridged, and the arguments and a portion of the opinion omitted.

introduced to show it. But no proof upon that subject could have been received against the objection of the defendant, for the reason that there was no allegation of the time of the payment.

The court below, therefore, erred in sustaining the demurrer to the answer, setting up the statute of limitations. * * *

Reversed.

WHITE v. SMITH.

(Supreme Court of Illinois, 1875. 77 Ill. 351, 20 Am. Rep. 251.)

Mr. Justice SHELDON delivered the opinion of the court.

This was an action, brought by plaintiff below, as assignee, upon the following instrument in writing:

"$50.00 Monticello, Ill., April, 17, 1866.

"For value received, I promise to pay to the Monticello Railroad Company, or order the sum of $50, to be paid in such installments and at such times as the directors of said company may, from time to time, assess or require. J. W. White."

The declaration averred that the directors, on the 1st of June, 1866, made an assessment of 5 per cent., which was paid; on the 7th of May, 1867, another assessment of 10 per cent., which was paid; on the 7th of January, 1868, another assessment of 35 per cent., of which there was notice to defendant, demand, and refusal of payment; and that, on January 6, 1869, another assessment of 50 per cent. was made, and like notice, demand, and refusal of payment, the several assessments amounting to the whole sum of money in the instrument mentioned, and that afterwards the instrument was indorsed and assigned to the plaintiff.

The court below overruled a demurrer to the declaration and rendered judgment for the plaintiff.

The error assigned is the overruling of the demurrer, and the question made is whether the instrument in suit is a negotiable promissory note.

Plaintiff in error asserts it not to be, because, by its terms, it is uncertain whether the money will ever become payable or not; that the payment depended on an act to be performed by the directors, which act might never be performed by them, or that the railroad company, from some cause, might cease to exist before any assessment had been made by the directors.

The principle is undoubted, that, to constitute a valid promissory note, it must be for the payment of money which will certainly become due and payable one time or other, though it may be uncertain when that time will come. And where the payment depends upon a contingency, it will make no difference that the contingency does,

in fact, happen afterwards, on which the payment is to become absolute, for its character as a promissory note cannot depend upon future events, but solely upon its character when created.

The instrument in question does, seemingly, depend for its payment upon a contingency. But there is a class of cases, says Judge Story, "which, at first view, seem to import that payment is to be made only upon the occurrence of events which may never happen, and yet which are uniformly held to be absolutely payable at all events. Thus, if a note be made payable at sight, or at 10 days after sight, or in 10 days after notice, or on request or on demand, in all these and the like cases the note will be held valid as a promissory note and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without having given any notice to or made any request or demand upon the maker for payment. But the law, in all cases of this sort, deems the note to admit a present debt to be due to the payee, and payable absolutely and at all events, whenever or by whomsoever the note is presented for payment according to its purport." Story, Prom. Notes, § 29.

We are inclined to hold that this instrument may be regarded as one falling under this class. The money here is payable to the company in such installments and at such times as its directors may from time to time require. The directors are the managing officers of the corporation, so that the money is really payable in such installments and at such times as the payee may require. It was, in effect, payable on demand, or in installments on demand. In the case of a note payable "on having twelve months' notice," it might be said that it was not certain that notice would ever be given. In reference to a note so payable "on having twelve months' notice," Abbott, C. J., in Clayton v. Gosling, 5 Barn. & C. 360, said: "Nor is the time of payment contingent, in the strict sense of the expression, for that means a time which may or may not arrive. This note was made payable at a time which we must suppose would arrive." The same, we think, with equal truth, may be said in respect to the present note.

We cannot well distinguish, in principle, this case from the one of Goshen Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273. The promise there was to pay the company $125 for five shares of the capital stock of the corporation, in such manner and proportion and at such time and place as the president, directors and company should from time to time require. It was held that the note was a good promissory note within the statute, the statute there, relative to promissory notes, being the same in substance as that of 3 & 4 Anne; that the note was payable absolutely, and not depending on any contingency; that it was, in effect, payable on demand. See,

also, Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459.

We are disposed to hold that there was no error in overruling the demurrer, and the judgment will be affirmed.

Judgment affirmed.

WOODBURY, WILLIAMS & ENGLISH v. ROBERTS.

(Supreme Court of Iowa, 1882. 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685.)

Action upon a promissory note. The cause was submitted to the circuit court upon the question of the negotiability of the note, under a written stipulation of the attorneys of the parties, and the court decided that the instrument is not negotiable. Plaintiffs appeal.

BECK, J. The only question in the case involves the negotiability of the note in suit, of which the following is a copy:

"$300. Dallas Township, Iowa, March 18, 1880.

"Three months after date, I promise to pay to the order of Warren Roberts three hundred dollars, at the First National Bank of Burlington, Iowa, value received, with interest at 10 per cent. per annum, including attorney's fees and all costs of collection. The makers and indorsers of this obligation further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely as he or they may see fit.

"[Signed] Warren Roberts."

Indorsed on the back: "Warren Roberts."

When an instrument is not certain, or is not capable of being made certain, as to the time of payment, the law does not regard it as negotiable paper. By the terms of the condition of the note in suit it would never fall due, but could be indefinitely extended at the will of the maker and indorser, who, it will be observed, is the same party. When the instrument was executed the time of its maturity was contingent upon the option of the maker of the note. It was impossible to determine when it would become due by the assent of the maker. The time of payment was uncertain and was not capable of being made certain. Nothing happened after its execution to remove this uncertainty.

Notes which by their terms are payable on or before a fixed time or a specified event are, it is true, uncertain as to the time at which they are payable. But there is no uncertainty as to the time when they become absolutely due. Paper of this character is regarded by the courts as negotiable. But the note before us may never fall due, for payment may be extended indefinitely.

The rules applicable to commercial paper were transplanted into the common law from the law merchant. They had their origin in the customs and course of business of merchants and bankers, and are

now recognized by the courts because they are demanded by the wants and convenience of the mercantile world. Surely these rules ought not to be extended to paper, the like of which was never heard of in mercantile transactions. What business man would expect a banker to discount his paper in the form of the note in question in this case? What merchant ever offered to give or was asked to receive a promissory note containing a like condition? We may safely say that notes of this kind are unknown to commercial transactions. Why, then, extend to them the rules of the commercial law?

By regarding such paper as nonnegotiable no prejudice will result to the mercantile and financial business of the country, but sharpers will be defeated in their attempts to swindle the confiding and unwary, a result in accord with sound public policy and good morals.

Miller v. Poage, 56 Iowa, 96, 8 N. W. 799, 41 Am. Rep. 82, and Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90, support the conclusions we have reached that the note in suit is not negotiable. The case last named holds a note to be nonnegotiable which contains the precise condition found in the note before us.

The judgment of the circuit court is affirmed.[36]

ROBERTS v. SNOW.

(Supreme Court of Nebraska, 1889. 27 Neb. 425, 43 N. W. 241.)

REESE, C. J. This action was instituted in the district court of Holt county upon a written instrument of which the following is a copy:

"Marshalltown, Iowa, July 16, 1877.

"For value received I hereby promise to pay to Peter Housel, or order, four hundred dollars ($400), with ten per cent. interest per annum, payable semi-annually in advance, and on default of prompt payment of the interest for thirty days after it is due, then this note, principal and interest, shall be due and collectible without defalcation or discount, together with an attorney fee of ten per cent. for collection. [Signed] B. L. Snow."

"Attest: C. C. Housel."

[36] Compare Farmer v. Bank, 130 Iowa, 469, 477, 107 N. W. 170 (1906). Contra: First National Bank v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878 (1908). In that case the court, referring to a clause like that discussed in the principal case, said: "This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face gives the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of time renders the instrument nonnegotiable. To us it is clear that it has the same effect as though the note read 'on the first day of October, 1903, or thereafter on demand.'"

Upon the back of the instrument are the following indorsements: "Pay to the order of C. C. Housel. Peter Housel, by C. C. Housel, Executor of the Estate of Peter Housel, Deceased." "Pay to the order of B. F. Roberts. C. C. Housel." * * *

The cause is presented to this court by plaintiff by proceeding in error, presenting a large number of assignments, but it is not deemed necessary to examine all. It appears that the question underlying the whole controversy in this case is as to the character of the instrument on which the suit was founded. It is insisted by plaintiff in error that the writing is a negotiable promissory note, and is entitled to be treated as such, with all the incidents which attach to negotiable paper; while upon the other hand it was contended by defendant in error that it is not a negotiable instrument, and that therefore the action by plaintiff in error could not be maintained, he not being the actual owner thereof by assignment. This contention is based upon the fact that the instrument does not fix a time certain within which the money must be paid.

It is our opinion that the instrument in question falls clearly within the definition of commercial paper, and that it was payable on demand, at any time after its execution, and should have been treated by the district court as a promissory note payable upon demand. In 1 Randolph on Commercial Paper, § 119, it is said: "If no time of payment is expressed, which is usually the case in checks, and frequently so in promissory notes and drafts, the instrument is, by intendment of law, payable on demand, and is as valid and negotiable as though the time of payment were fully expressed"—citing a large number of authorities, among which are Jones v. Brown, 11 Ohio St. 601; Holmes v. West, 17 Cal. 623; Porter v. Porter, 51 Me. 376; Keyes v. Fenstermaker, 24 Cal. 329; Bank v. Price, 52 Iowa, 570, 3 N. W. 639; Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903.

The rule seems to be that in cases of this kind the legal intendment, that the notes are payable upon demand, cannot be changed by parol proof any more than could the expressed terms of a written instrument be changed. See Thompson v. Ketcham, 8 Johns. (N. Y.) 192, 5 Am. Dec. 332; Koehring v. Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; Self v. King, 28 Tex. 552.

But it may be contended that it is shown upon the face of the note itself that such was not the intention of the parties at the time of its execution, for it is provided that the interest shall be payable semiannually, and that the note shall become due and collectible on the expiration of 30 days after default of the payment of the interest; but this would make no difference as far as the note was concerned. As held in Jones v. Brown, supra, the fact that the parties provided for the payment of the interest in case the note should not be paid immediately, would not change the legal effect of the contract. Upon

this subject, see Loring v. Gurney, 5 Pick. (Mass.) 15; Meador v. Bank, 56 Ga. 605; Holmes v. West, 17 Cal. 623.

Aside from what would seem a rather inflexible rule of law, as applied to instruments of the kind under consideration, a careful examination of the note in question satisfies us that no other construction can be given to its language.

There is nothing upon the face of the instrument itself, nor pleaded by the answer, nor submitted in the evidence in the case, which shows that any relation existed between the parties to the instrument by which it could be presumed or supposed that it was their purpose that the note should never mature. If it cannot be treated as a promissory note payable upon demand, then the only event which could occur by which the note could be made to mature, according to its own language, would be a default of 30 days in the payment of the semi-annual interest; and if such default should never be made, the note would never mature, and therefore could never be collected except by the voluntary payment of the maker. This, evidently, was not the intention of the parties to the instrument. * * *

Reversed and remanded.[37]

LOUISVILLE BANKING CO. v. GRAY et al.

(Supreme Court of Alabama, 1899. 123 Ala. 251, 26 South. 205, 82 Am. St. Rep. 120.)

This action was brought by the appellant, the Louisville Banking Company, against C. Crozier Gray and George Gray, and counted upon a promissory note which was given by the defendants to the Commercial Bank of Selma, and made payable at the Commercial Bank of Selma, on December 12, 1896, and which note was indorsed by the said Commercial Bank of Selma and was alleged in the complaint to be the property of the plaintiff. The defendants filed several pleas, in which they set up payment of said note, and they also filed the following special plea:

"No. 10. The defendants, by leave of the court, for further answer to the complaint in this cause, say: That the promissory note sued on in this suit is in words and figures in substance as follows: '$500.00. Selma, Ala., Nov. 9th, 1896. On the 12th day of Dec., 1896, we promise to pay to the order of the Commercial Bank of Selma, Ala., the sum of five hundred and $^{00}/_{100}$ dollars, at the Commercial Bank of Selma, Selma, Ala. Due Dec. 15, 1896. The makers and indorsers of this note waive the right to claim exemption under the constitution and laws of this or any other state, and authorize said bank to appropriate on this note, whether due or not, at any

[37] Part of the opinion is omitted.

time, at its option, without notice or legal proceedings, any money which they, or any one or more of them, may have jointly or severally in said bank, on deposit or otherwise; and further agree to pay all costs of collection, including a reasonable attorney's fee, upon failure to pay said note at maturity. Demand, protest, and notice of dishonor and all other requirements to hold them are hereby waived by the indorsers of this note. [Signed] C. Crozier Gray. George Gray.' And defendants aver that before the commencement of this suit they paid said note to said Commercial Bank of Selma, Ala., without notice that the plaintiff held or owned said note, and without notice that said Commercial Bank of Selma did not hold or own the same, and they aver that when they so paid said note the same was due."

The plaintiff demurred to the defendants' tenth plea, upon the following grounds: (1) It appears from said plea that said note is commercial paper, and governed by the commercial law; (2) that it does not appear from said plea that the plaintiff is bound by payment to the Commercial Bank of Selma; (3) that it does not appear from said plea that said Commercial Bank of Selma held or owned said note at the time of payment. The demurrer to the tenth plea was overruled. To this ruling the plaintiff duly excepted.[38]

TYSON, J. The single question presented for decision is whether the clause, "and authorizes said bank to appropriate on this note, whether due or not, at any time, at its option, without notice or legal proceedings, any money which they, or any one or more of them, have jointly or severally in said bank, on deposit or otherwise," destroys the negotiability of the note. The note sued upon was a promise in writing to pay $500 to the Commercial Bank of Selma on the 12th day of December, 1896, "Due Dec. 15, 1896, at the Commercial Bank of Selma, Ala.," and indorsed by the bank to the plaintiff.

The essentials of every promissory note are: (1) It must be in writing, and signed by the maker; (2) it must contain a certain promise to pay; (3) the fact of payment must be certain; (4) the amount to be paid must be certain; (5) the medium of payment must be money, and money only; (6) it must be delivered; and to make it a commercial paper, under our statute, it must be payable at a bank or private banking house, or a certain place of payment therein designated. Code, § 869; 1 Daniel, Neg. Inst. §§ 27–63.

The only difference between the ordinary promissory note and the commercial promissory note is the one made by the statute. The latter must have a designated place of payment named in it. There can be no question that the note under consideration, as to a designated place of payment, contains this statutory requisite. The contention is that the clause quoted above renders the date of payment uncertain or the

[38] The statement is abridged, and the arguments are omitted.

amount uncertain to be paid at the maturity of the note. If either of these contentions should prevail, it not only destroys the negotiability of the note as commercial paper, but would destroy its character as a promissory note, leaving it nothing more than a simple contract to pay money, and, of course, subject to all defenses by the maker.

The only one of these contentions that is at all plausible is the one that the clause renders the note uncertain as to the date of payment. The makers, at all events, obligated themselves to pay $500. That was the amount named in the paper they were to pay, whether the payment was made at maturity, or whether the bank exercised its option to appropriate any funds in its possession to its payment pro tanto or in full. The clause provided for no reduction in the sum to be paid, in the event of the appropriation by the bank before the day fixed for its maturity. Had the appropriation been made by the bank the next day after the delivery of the note, and the funds so appropriated been $500, the amount of the note, the makers could not have demanded a diminution on account of interest, or otherwise, nor would the bank have been liable to them, or either of them, for a misappropriation of funds.

But it is said the bank had the right to apply any sum less than the full amount of the note, and, had it exercised this right before its maturity, would render uncertain the amount due by the makers at the maturity of the note. We must confess our inability to comprehend how a sum certain deducted from a sum certain could produce an uncertain sum. It is needless to say that it is a matter of simple arithmetical subtraction.

It is said, further, had such an appropriation been made by the bank before its maturity, so as to entitle the maker to a credit upon the note of a partial payment, the bank was not bound to evidence such payment by indorsement upon the note, and therefore the bank could have negotiated the note to the plaintiffs in due course of trade, for value, without notice of such partial payment before maturity. Though this would have been a palpable fraud, had the bank done so—and we may confess that it had the power to commit it—yet how does this fact affect the validity or negotiability of the note? The power was reposed by the makers, and, unless the clause itself renders the sum agreed by them in the note to be paid uncertain, certainly no misconduct or fraud of the payee after the delivery of the note, unless expressed in writing upon it, so as to carry notice to a purchaser of such misconduct or fraud, could affect his title, if he paid value for it before its maturity. The purchaser would have the right to presume, unless the sum appropriated by the bank—and it is not contended in this case that the bank made any appropriation whatever—was indorsed somewhere upon the note, that none had been made by the bank, and that the full amount of the note was owing by the makers. And this is bound to be true, upon the plainest prin-

ciples that "fraud is never presumed." But had the plaintiff—which it was not bound to do—made the inquiry of the bank, at the time of its purchase of the note, if it had appropriated either of the makers' money to the debt evidenced by the note in suit, the only truthful information that could have been imparted, under the facts of this case, would have been that it had not done so. We will not pursue the inquiry into this phase of the case further, but will now discuss the other suggestion: Did the clause in the note render the note uncertain as to its date of payment?

It will be observed that there was no obligation imposed upon the makers to pay before December 15, 1896, the date fixed for the maturity of the note. No action could have been maintained upon it by the payee or the holder against them until after the latter date above named. Nor had they the right to mature the note earlier than that date, nor to make partial payments upon it; nor could they have compelled the holder to accept the full payment of it before maturity. It would have required the consent of the holder for them to do any one or all of these things. The clause imposed no obligation upon the bank to apply money deposited by both or either of the makers to the satisfaction of the note pro tanto or in full while it was its property. It was a mere option, which it could have exercised or not, at its pleasure. Had the makers, or either of them, placed upon deposit in the bank, or otherwise in its custody or possession, the next day after the execution of the note, and permitted it to remain until its maturity, treble the sum of money which they had stipulated in the note to pay, yea, a hundred times this sum, the bank was under no legal duty to apply any portion of it. A similar provision in a note, and involving the principle here announced, was passed upon by the supreme court of New York in the case of Hodges v. Shuler, 22 N. Y. 114.[39] * * * Our opinion is that this instrument sued upon was a commercial promissory note.

Reversed.

WISCONSIN YEARLY MEETING OF FREEWILL BAPTISTS v. BABLER.

(Supreme Court of Wisconsin, 1902. 115 Wis. 289, 91 N. W. 678.)

This is an action in equity, brought by the respondent, a corporation, to set aside the sale and transfer to the appellant of a certain promissory note and mortgage, which was the property of the respondent, and to recover the possession of the same. The case was tried by the court, and the evidence showed that the respondent was a religious corporation organized under chapter 23 of the Private and

[39] See this case, post, p. 109. The court's statement of it is omitted.

Local Laws of Wisconsin for 1867, and had a board of six trustees, its active officers being a president, secretary, and treasurer; that said corporation never adopted any by-laws as to the management of its affairs, and had no principal office; that from time to time it received donations of money, which the trustees put in the care of the treasurer, to be loaned, and the interest to be used for the support of weak churches and indigent ministers of the denomination; that one J. F. Sears was treasurer of the corporation from the year 1896 up to June 1, 1901, when he died; that on March 15, 1901, Sears loaned to one Prisk, from the funds of the corporation, $4,800, and took a note therefor, payable to the order of "J. F. Sears, Treas., or his successor," payable five years after date, with interest at 5½ per cent.; that such note contained a power of attorney, which authorized a confession of judgment at any time thereafter, whether due or not; and said note was secured by a real estate mortgage in which the mortgagee is described as "J. F. Sears, Treas., or his successor in office of the Wisconsin Yearly Meeting of Freewill Baptists"; that on April 22, 1901, Sears sold and delivered said note and mortgage to appellant for the sum of $4,827.13, the appellant paying therefor $3,900 in checks, and turning over to Sears two notes of $500 each, which had before that time been given by Sears to the appellant for borrowed money, Sears paying back to the appellant $133.53; that the appellant, Babler, could not read English, but that the note was read to him by Sears, and that the mortgage was present, and delivered at the same time, but was not read by Babler; that Sears converted the money which he received from Babler to his own use, and that the corporation has received no part of it; that the sale of the note and mortgage to the appellant was unauthorized, and without the knowledge of the trustees; that Babler neglected to make inquiry as to whether Sears had authority to sell the note in question.

Upon these facts the circuit court found that the defendant was negligent in purchasing the note and mortgage without inquiry; that the note was nonnegotiable; and that the plaintiff was entitled to a judgment setting aside the transfer of the note and mortgage, and adjudging that the same be delivered by the defendant to the plaintiff. From this judgment the defendant appeals.[40]

WINSLOW, J. (after stating the facts as above). It is entirely clear from the evidence in the case and from the findings of fact that the note and mortgage in question were the property of the plaintiff corporation, and that no express authority had ever been given to Sears to sell them. These being the facts, the defendant, Babler, could acquire no title to the note by his transaction with Sears unless the note was negotiable paper, or unless Sears had either the apparent ownership or apparent authority to sell it, so that the corporation

[40] The arguments of counsel and part of the opinion are omitted.

would be estopped to deny the act. It is quite certain that the note was not negotiable, because by the power of attorney which it contained judgment could be entered upon it at any time after its date, whether due or not. Thus the time of payment depends upon the whim or caprice of the holder, and is absolutely uncertain. This deprives the note of its negotiability. Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100.

Chapter 356, Laws 1899 (the negotiable instrument law), provides that the negotiable character of an instrument is not affected by a provision authorizing a confession of judgment if the instrument is not paid at maturity. Section 1675—5, subd. 2. Upon familiar principles of statutory construction this provision makes a note like the present nonnegotiable. Nor can it be said that Sears had such apparent ownership or authority to sell the note as would estop the plaintiff corporation from denying his act. The note, upon its face, shows that it was held by Sears in a representative capacity merely. * * *

Judgment affirmed.[41]

THORP v. MINDEMAN et al.

(Supreme Court of Wisconsin, 1904. 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.)

This is an action to foreclose a note and mortgage given by the defendants Mindeman and wife to one Henry Herman, the defense being an entire want of consideration. The note was a promissory note for $6,500, dated December 11, 1900, payable three years after date, with interest at 5 per cent. per annum, semiannually, and contained the following provisions inserted before the signature: "The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal shall, at the option of the mortgagee, or his representatives or assigns, (notice of such option being hereby expressly waived), become due and payable without any notice whatever."

The mortgage accompanying the note contained the following provisions: "Provided, always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the just and full sum of sixty-five hundred ($6,500) dollars three years after date with interest at 5 per cent. per annum, interest

[41] See Commercial Bank v. Brewing Co., 16 App. D. C. 186 (1900).

payable semiannually according to the conditions of one promissory note and coupons bearing even date herewith, executed by the said George Mindeman, one of the parties of the first part, to the said party of the second part, and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said premises and shall deliver or exhibit receipts therefor to said party of the second part, his heirs, executors, administrators or assigns, on or before the first day of May next after such taxes shall have become due and payable, and shall insure and keep insured the buildings thereon or to be hereafter erected against loss or damage by fire in the sum of eight thousand dollars or over, in insurance companies to be approved by the said party of the second part, his heirs, executors, administrators or assigns, such insurance to be payable in case of loss to the said party of the second part, his heirs, executors, administrators or assigns, as his mortgage interest may appear, and the policy or policies of insurance to be held by him, and in default thereof it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to effect such insurance, and the premiums and other legal expenses and charges paid for affecting the same, together with interest thereon at the rate of 10 per cent. per annum, shall be a lien upon the said mortgaged premises added to the amount of the said note, and secured by these presents until the payment of said note, then these presents shall be null and void. But in case of the non-payment of any sum of money (either principal, interest or taxes) at the time when the same shall become due, or of failure to insure said building agreeably to the conditions of these presents, or in case of failure to deliver or exhibit such receipt as above provided, or in case of failure on the part of said parties of the first part to keep or perform any other agreement, stipulation or condition herein contained, then in each case or all such cases, the whole amount of the said principal sum shall, at the option of the said party of the second part, his heirs, executors, administrators or assigns, which may be exercised at any time after any default, without any notice whatever to the mortgagors, or either of them, their heirs, executors, administrators, or assigns, service or giving such notice in any manner being hereby expressly waived, be deemed to have become due, and the same with interest thereon at the rate aforesaid shall thereupon be collectible in a suit at law or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid."

It appeared from the testimony of the defendant Mindeman, which was taken under objection, that the note and mortgage was given to cover advances to be made to him by Herman, but that none were ever in fact made. September 11, 1902, Herman sold the note and mortgage to the plaintiff, who was an innocent purchaser thereof, and made the following indorsement upon the note:

"For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached and numbered four to six inclusive, (previous interest coupons having been paid and surrendered), to Josephine Thorp, without recourse."

Findings and judgment of foreclosure were made and signed, and the Mindemans appeal from the judgment as well as from a subsequent order appointing a receiver.[42]

WINSLOW, J. (after stating the facts as above). The important question in this case is whether the note in suit is negotiable. The appellants argue that the note and mortgage must be construed together as one contract; that, so construed, the note requires the performance of other acts besides the payment of money, and is rendered uncertain both as to amount and time of payment, and hence is nonnegotiable. The general rule that agreements contemporaneously executed and pertaining to the same subject-matter are to be construed together is so familiar and so frequently acted upon that it needs only to be stated. The question how far, if at all, this rule imports into a promissory note the collateral agreements contained in an accompanying mortgage, is the question to be considered in this case.

The collateral agreements contained in the mortgage, which the appellants claim are imported into the note and destroy its negotiability, are: First, the agreement that, in case of failure by the mortgagor to insure the buildings in the mortgagee's favor in approved insurance companies, the mortgagee may insure the same, and the premiums paid shall be a lien on the premises "added to" the amount of the note; and, second, the agreement that in case of failure to so insure, or to pay interest or taxes when due, or to deliver or exhibit tax receipts showing the payment of the taxes, then the whole principal shall become due at the mortgagee's option, and without notice. It will be observed that the only one of these agreements which the note contains in terms is the agreement that the principal shall become due without notice, at the option of the mortgagee, upon failure to pay interest or comply with any of the other conditions of the mortgage; but the argument is, in effect, that all of the collateral agreements in the mortgage have become a part of the note by virtue of the legal principle just stated. This is a decidedly revolutionary proposition. If it be true, both the business world and the courts have been sadly in error for many years. This court held at an early day that a note negotiable on its face retained its negotiable character notwithstanding it was secured by a mortgage upon real estate, and, when transferred before due, carried the mortgage with it relieved of all equities (Croft v. Bunster, 9 Wis. 503); and that the words "secured by real estate mortgage" upon the face of the note were not sufficient to charge the assignee with notice of any defense, nor of

[42] Part of the opinion is omitted.

the terms of mortgage (Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904). If all the agreements contained in every mortgage are, as matter of law, imported into the note, these propositions could not be true, for the general rule (except as changed by statute) is that negotiable instruments cannot be bound up and fettered with collateral agreements for the doing of other things besides the payment of money, and retain their negotiable character.

Upon the principle contended for, the most simple real estate mortgage would deprive the note which it secures of its negotiable character, because it would import into the note one or more collateral agreements which are not for the payment of money. Fortunately it is not necessary to give so violent a shock to the well-understood principles of law governing the negotiability of notes and mortgages. The appellants' contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instruments relating to the same subject-matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms; such as the payment of taxes, the insurance of houses, and the like.

While the two instruments will be construed together whenever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is nego-

tiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant.

This idea is well expressed in the case of Garnett v. Myers, 65 Neb. 280, 94 N. W. 803, where it is said: "If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterwards allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself."

It may be added to this that provisions to that effect in the mortgage no not affect at all the absolute character of the promise to pay contained in the note, and hence do not affect its negotiability. A very interesting and instructive discussion of this question will be found in the opinion in the case of Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872, where the same conclusion is reached.

The propositions so far laid down seem incontrovertible if the principle is to be maintained that a note negotiable in form remains negotiable notwithstanding it is secured by an ordinary real-estate mortgage. As might be expected, we are referred to no authorities which really take issue with that principle, or squarely hold that the agreements of every mortgage are imported into the accompanying note. The nearest approach to such a holding, perhaps, is the case of Noell v. Gaines, 68 Mo. 649, where a provision in a deed of trust as to the time of payment of the debt was held to control the terms of the note in the hands of a purchaser with notice. A very vigorous and persuasive dissenting opinion was filed in this case, which forms instructive reading on this very question; but, in any event, the case does not reach the proposition that agreements in a mortgage, simply relating to the preservation of the security, are ever to be considered as imported into the note. Starting from the fundamental proposition that the ordinary negotiable note, accompanied by the ordinary real-estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, both being a part of the same transaction, but each relating to its own subject-matter and not interfering with the other, just as a building contract and a bond to secure its performance are separate and distinct, let us consider in what respect, if any,

the note and mortgage in this case differ from the ordinary note and mortgage.

As will be seen by reference to the papers themselves, the mortgage contains conditions requiring the payment of taxes on the premises by the mortgagor; the exhibition of the receipts therefor to the mortgagee; the maintenance of insurance on the buildings in approved companies, with the right to the mortgagee to insure in case of failure of the mortgagor, the expense to be a lien on the premises "added to the amount" of the note; also a provision that in case of failure to pay interest, taxes, or insurance, or to exhibit the tax receipts, the principal sum shall, at the option of the mortgagee, become due without notice. Turning to the note, we find that it provides that, if default is made in payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage, then the principal shall become due, at the option of the mortgagee, without notice. It will be noticed at once that none of the collateral agreements of the mortgage are in terms imported into the note except the agreement that the principal shall become due, at the mortgagee's option, in case of failure to perform any of the agreements of the mortgage. It will be noticed also that the other collateral agreements contained in the mortgage are simply agreements providing for the due preservation of the mortgage security, and not affecting in any way either the time of payment or the amount of the note. These agreements are the agreement to pay the taxes and exhibit the receipts, the agreement to effect and maintain insurance on the buildings for the mortgagee's benefit, and the agreement that the mortgagee may insure in case of default, and have a lien on the premises "added" to the note for the premiums paid. There was, indeed, a claim made that the agreement that the premiums paid should constitute a lien added to the note meant that the note was to be increased by the amount paid, so that the amount of the note was thereby rendered uncertain; but we think it plain that the clause simply provides for the acquiring of a lien upon the premises in addition to the lien of the note. This meaning seems so obvious to us that we will spend no more time upon the suggestion.

These last-named collateral agreements, then, being simply proper agreements for the preservation of the security, and not intended nor fitted to qualify or affect in any way the absolute promises of the note, do not, upon the principles hereinbefore laid down, enter into or change the note in the least, nor affect its negotiability.[43] Such being the case, we have only to consider the question whether the agreement that the whole principal of the note shall be due at the mortgagee's option in case of a failure to pay interest or perform any of the conditions of the mortgage renders the note nonnegotiable. Upon this question appellants place reliance upon the cases of Continental

[43] Accord: Farmers' Bank v. McCall (Okl.) 106 Pac. 866 (1910).

Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409, and W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100.

In the first of these cases, an agreement inserted in the note, providing that the payee might sell collateral securities at any time if they declined in value, and apply the proceeds, less expense of sale, on the debt, and the balance should forthwith become due, was held to make the note uncertain as to amount and time of payment, and hence nonnegotiable. In the Kimball Case, an agreement that, in case of failure to pay any installment, or of any attempt to dispose of or remove the chattel for which the note was given, the holder might declare the whole amount due, and collect same by suit or sale of the property, and, if there was a deficiency after sale, it should be payable on demand, was held to make both amount and time of payment uncertain, and hence make the note nonnegotiable. It must be admitted that both of these cases have a strong tendency to support the position of the appellants upon the proposition that the time of payment is rendered uncertain by the agreement before us. Especially is this true of the Kimball Case. In that case the uncertainty as to time resulted from the fact that, in case the giver of the note failed to pay an installment, or attempted to dispose of or remove the property sold, the holder might at once collect the whole. In the present case the agreement is that in case of failure to pay interest or keep taxes and insurance paid the holder may at once collect the whole. In both cases the contingency depends upon the acts or omissions of the maker of the note.

We should find it quite hard, if not impossible, to differentiate the two cases were it not for the provisions of the negotiable instruments law (chapter 356, p. 681, Laws 1899), which was passed since the decisions cited, and prior to the giving of the note in question. This law gives the general requirements of negotiable paper in section 1675—1, p. 682, among which are the following: "(1) It must be in writing signed by the maker or drawer. (2) Must contain an unconditional promise or order to pay a sum certain in money. (3) Must be payable on demand or at a fixed or determinable future time." The law then provides, in section 1675—2, p. 684, that the sum is certain within the meaning of the law though it is to be paid "(3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due." The law further provides, in section 1675—4, p. 686, that an instrument is payable at a determinable future time, within the meaning of the law, which is payable "(4) at a fixed period after date or sight, though payable before then on a contingency." These two provisions seem to cover this whole case, and leave really nothing to discuss. This note is payable at a fixed period after date, but may be made payable before that time upon the happening of certain contingencies which are within control of the maker. The latter clause quoted would seem

to have been added to meet just such cases as the present. Such agreements as we have here are of very frequent occurrence, and it was evidently the purpose to provide for them.

The case of Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678, is also somewhat relied on by appellants, but it evidently has no bearing on the case. In that case it was held that a clause in a note authorizing the confession of judgment at any time, whether due or not, rendered the note nonnegotiable, because the time of payment depended entirely on the whim or caprice of the maker. As an additional reason for the ruling, the fact that the negotiable instruments law allows the insertion of a clause authorizing a confession of judgment if not paid at maturity was also referred to.

While we have considered this question as absolutely settled by the negotiable instruments law, it must not be supposed that we have failed to examine and carefully consider the numerous cases cited by the appellants, mostly from Western courts, as having some bearing upon this question. We have been unable to find that any of these cases really conflict with the general proposition laid down in the beginning, namely, the proposition that the ordinary provisions of a real estate mortgage requiring payment of taxes and other acts by the mortgagor for the preservation of the mortgaged property are not imported into the accompanying note simply because the papers are simultaneously executed as a part of the same transaction. A number of them are cases decided by the Kansas Court of Appeals, and are, in substance, to the effect that, where a bond or note in terms refers to the mortgage, and declares it to be "a part of this contract," and the mortgage contains covenants to pay taxes, insure, keep buildings in repair, and the like, and that the entire sum shall become due in case of default in any of such agreements, this renders the bond or note nonnegotiable. Such are the cases of Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720; Chapman v. Steiner, 5 Kan. App. 326, 48 Pac. 607, and Wistrand v. Parker, 7 Kan. App. 562, 52 Pac. 59. It goes without saying that such cases have no bearing on the present case, because here there is no clause in the note making the mortgage a part thereof, or adopting its provisions, except the provision authorizing the whole amount to be declared due upon certain contingencies.

Another line of cases, from Nebraska, hold that, where a mortgage provides that the mortgagor shall pay the taxes levied on the mortgagee for or on account of the mortgage, this agreement destroys the negotiability of the note, because it renders the amount uncertain. Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; Consterdine v. Moore, 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620; Allen v. Dunn, 71 Neb. 831, 99 N. W. 680. Such seems also to be the effect of the case of Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536. Without stopping to consider whether these

decisions should be approved or not, it is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note.

In the cases of Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779, and Gilbert v. Nelson, 5 Kan. App. 528, 48 Pac. 207, notes containing stipulations very similar to those found in the present case are pronounced nonnegotiable upon what seems to us very unsatisfactory reasoning, which we feel no inclination to follow, especially in view of the positive provisions of our negotiable instruments law before cited.

The cases of Dilley v. Van Wie, 6 Wis. 209, and Elmore v. Hoffman, Id. 68, are also cited as sustaining appellants' contention, but it is evident that they do not. In the Dilley Case the note contained an express clause subjecting it to the provisions of another agreement, made on the same day, by which it appeared that the payment was subject to certain equities between the parties. The clause was rightly held to deprive the paper of its negotiable character. In the Elmore Case it was held that a collateral agreement made between the parties contemporaneously with a note, by which the payee agreed to give day of payment on the note till the happening of a certain named contingency, was admissible in evidence to defeat an action on the note in the hands of one who purchased the note with notice of the contemporaneous agreement. We hold, therefore, that under the present negotiable instruments law the note in the present case is negotiable, and in so holding it is evident that the cases of Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409, and W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100, are overruled so far, at least, as they hold that such agreements create an uncertainty in the time of payment.

The next contention made by the appellants is that the written transfer of the note was not a commercial indorsement, but a mere assignment, and hence that the transferee took it subject to all equities. We think this contention cannot be sustained. The addition of the words "without recourse" does not impair the negotiable character of the instrument. Laws 1899, p. 701, c. 356, § 1676—8. While there is doubtless some authority tending to support appellants' claim, we think that there can be no doubt that the transfer in the present case must be held to be a commercial indorsement under the decisions of this court in the cases of Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720; Bange v. Flint, 25 Wis. 544; Murphy v. Dunning, 30 Wis. 296. In all of these cases a negotiable note was transferred by attaching it to a negotiable bond which recited that the note was thereby "as-

signed and transferred" to the holder of the bond as security for the payment of the bond, there being no indorsement on the note itself; and this was held an indorsement within the law merchant. Here there is an agreement on the back of the note itself, signed by the payee, by which he sells, assigns, and transfers the note to the plaintiff. The intent to pass title and make the note transferable by indorsement and delivery afterwards seems very plain. Such, also, seems to be the current of authority. 1 Daniel, Neg. Inst. (5th Ed.) § 688c.[44] * * *

Judgment affirmed.

COOKE v. HORN.

(Court of Queen's Bench, 1873. 29 L. T. N. S. 369.)

This was an action upon a promissory note, tried before Honyman, J., at the York Summer Assizes. A verdict of £175. 5s. 10d. was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him, on the ground that the note was not good.

The form of the note was as follows:

"£170. 25th April, 1872.

"We promise to pay to Messrs. M. H. Cooke and Co. £170., with interest thereon at the rate of £5. per cent. per annum, as follows: The first payment, to wit, £40. or more, to be made on the 1st Feb., 1873, and £5. on the first day of each month following until this note and interest shall be fully satisfied. And in case default shall be made in payment of any of the said instalments, the full amount then remaining due in respect of the said note and interest shall be forthwith payable."

The note was signed by the defendant and one John Horn, since deceased.

J. W. Mellor, on behalf of the defendant, moved in pursuance of the leave reserved. This instrument cannot be considered a promissory note, for it is not made for the payment of a certain sum at a particular day. If the defendant paid more than £40. on the 1st Feb., which would be in accordance with the terms of his promise, there could be no certainty as to his liability for the remaining instalments concerning either the amount or the day. In Smith v. Nightingale, 2 Starkie, 375, the promise was to pay on a particular day a certain sum, with interest, "and also all other sums which may be due to him." Lord Ellenborough was of opinion (page 376) "that the instrument was too indefinite to be considered as a promissory note; it contained

[44] Accord: Baldwin Co. v. Carmichael, 116 Ga. 762, 42 S. E. 1002 (1902). Contra: Osgood v. Artt (C. C.) 17 Fed. 575 (1883). Compare Packer v. Roberts, 140 Ill. 671, 29 N. E. 668 (1892).

a promise to pay interest for a sum not specified, and not otherwise ascertained than by reference to the defendant's books, and that since the whole constituted one entire promise, it could not be divided into parts. He also held, that since the instrument contained an agreement to pay the money, it could not be receivable in evidence as an acknowledgment without a stamp." Similarly, this note contains a promise to pay interest for a sum the amount of which, after the 1st Feb., is not specified. Moreover, the day of final payment depends upon the contingency of the defendant's first payment; and it has been held that a promissory note cannot be so indefinite, e. g., to pay so many days after marriage (Beardsley v. Baldwin, 2 Stra. 1151). [BLACKBURN, J. That is only when the event may never happen; if the period of payment be inevitable, as upon a death, it need not be definite.] Here there is no statement of the sum upon which interest is to be paid.

BLACKBURN, J. I do not think there should be any rule in this case. The objection to the note is, that if the first payment were more than £40., which the note provides it might be, the subsequent instalments and the final time for payment would be indefinite. The amount of the note, however, is certain, and any variation in the time will depend only upon the defendant. No case has been cited which is an authority against this note; and by analogy with other objections, this one, as it seems to me, ought not to prevail. I do not see why a stipulation which enables the maker of a note to reduce his liability for interest, should prevent the instrument containing it from being a promissory note.

QUAIN and ARCHIBALD, JJ., concurred.

Rule refused.

LEADER v. PLANTE.

(Supreme Judicial Court of Maine, 1901. 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415.)

FOGLER, J.[45] This is an action of assumpsit by the indorsee against the maker of a written instrument, declared upon as a promissory note, of the following tenor, namely:

"$406. Auburn, Maine, August 30th, 1892.

"Within one year after date I promise to pay to the order of Richard F. Leader four hundred and six dollars at with interest. Value received. Telesphore Plante."

Witness: "P. H. Kelleher."

Indorsed: "Richard F. Leader."

[45] Part of the opinion is omitted.

The writing was indorsed and delivered by the payee to the plaintiff January 2, 1893.

It is claimed in defense that the instrument is not a valid negotiable promissory note, for the reason that the time of payment named therein is not stated with sufficient certainty. In other words, it is contended that "within twelve months" is too uncertain and indefinite as to time of payment to give the instrument the character of a negotiable promissory note. It is familiar law that, to constitute a negotiable promissory note, the time of payment must be stated with certainty. It is also a familiar maxim that that is certain which can be made certain.

"A valid promissory note is not necessarily negotiable. To make it such by the law merchant it must run to order or bearer, be payable in money for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely, and not upon a contingency." Roads v. Webb, 91 Me. 410, 40 Atl. 128, 64 Am. St. Rep. 246.

It is well settled that a note payable at the death of the maker is a valid negotiable promissory note, as death will inevitably occur, and the time of payment can thus be made certain. Martin v. Stone, 67 N. H. 367, 29 Atl. 845.

"Within" a certain period, "on or before" a day named, and "at or before" a certain day, are equivalent terms, and the rules of construction apply to each alike. As stated by Mr. Justice Strout in Roads v. Webb, supra, the question whether a note made payable "on or before" a day certain states the time of payment with sufficient certainty to constitute a negotiable note has not been decided in this state.

In Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464, a note "to be paid in the course of the season now coming" was held to be negotiable for the reason that the "season now coming" must come by mere lapse of time.

But in Hubbard v. Mosely, 11 Gray, 170, 71 Am. Dec. 698, the court of Massachusetts held that a promissory note payable 90 days after date, containing a stipulation that the note shall be given up to the maker as soon as the amount of it is received by the payee, is not negotiable; thus practically overruling the case of Cota v. Buck.

The late Massachusetts decisions upon this point follow the doctrine of Hubbard v. Mosely. Way v. Smith, 111 Mass. 523; Stults v. Silva, 119 Mass. 137.

Mr. Justice Cooley, in Mattison v. Marks, 31 Mich. 423, 18 Am. Rep. 197, referring to Hubbard v. Mosely, remarks: "It is to be regretted, perhaps, that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain."

In Jillson v. Hill, 4 Gray (Mass.) 316, it was held that a note payable "on demand, with interest within six months," was a promise to pay within six months in any event, and sooner if demanded.

We think that the great weight of authority and of reason is opposed to the present Massachusetts doctrine.

Mattison v. Marks, supra, was a suit upon a written instrument containing a promise to pay a sum certain "on or before" a day named. It was contended in defense that it was not a promise to pay on a day certain, and consequently was not a negotiable promissory note. The court held that the instrument was a negotiable promissory note. Mr. Justice Cooley, in delivering the opinion of the court, says: "The legal rights of the holder are clear and certain. The note is due at a time fixed, and it is not due before. True, the maker may pay sooner, if he shall choose; but this option, if exercised, would be a payment in advance of the legal liability to pay, and no more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings."

It is held in Curtis v. Horn, 58 N. H. 504, that a promissory note, payable "on or before the first day of May next," is negotiable. The court say in the opinion: "It is now the common law that, where payment is made to depend upon an event that is certain to come, and uncertain only in regard to the time when it will take place, the note or bill is negotiable." The court say further: "The recent Massachusetts cases cited by the defendant place the conclusions arrived at upon common-law grounds; yet they fail to state the reasons for overruling Cota v. Buck, and the law as held in other jurisdictions, and we are unable to see any."

The doctrine thus laid down by the courts of Michigan and New Hampshire is fully sustained by numerous authorities, of which we cite Bates v. Leclair, 49 Vt. 230; Riker v. Manufacturing Co., 14 R. I. 402, 51 Am. Rep. 413; Insurance Co. v. Bill, 31 Conn. 534–538; Jordan v. Tate, 19 Ohio St. 586; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268–285, 10 Sup. Ct. 999, 34 L. Ed. 349; Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542.

Our conclusion is that the instrument here in suit is a valid, negotiable, promissory note. * * *

Judgment for plaintiff.

(III) As to Medium of Payment

HODGES v. CLINTON.

(Supreme Court of North Carolina, 1792. 1 N. C. 53.)

Case. The jury found the following special verdict:

"The jury sworn, find that the defendant did assume, find no set-off, find the defendant did not take the benefit of the act of insolvency, and assess the plaintiff's damage to £73. 16s. and 6d. costs, subject to the opinion of the court whether the note on which the plaintiff's action is grounded is a negotiable note within the statute; if it is, they find for plaintiff; if not, for defendant."

The note was for £100. currency, payable in tobacco.

Taylor, for the defendant, argued that no decision upon St. 3 & 4 Anne, c. 9, to which our act of 1762 was in analogy, was to be found, that gave negotiability to notes, except they were for the payment of money alone. Besides the many cases establishing the doctrine, that even notes payable in money are not negotiable if they are contingent, the case of the East India bond is in point with the present. Moore v. Venlute. And if anything else is promised besides the payment of money, the note is not negotiable. 1 Sharp. 629. The design of the act, which was to give to notes a circulation equally beneficial to commerce with bills of exchange, would be frustrated by a contrary decision.

Judgment for the defendant.

HODGES v. SHULER.

(Court of Appeals of New York, 1860. 22 N. Y. 114.)

Appeal from the Supreme Court. The action was against the defendants as indorsers of the following instrument or note:

"Rutland & Burlington Railroad Company.

"No. 253. $1,000.

"Boston, April 1, 1850.

"In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. & D. W. Shuler, or order, $1,000, with interest thereon, payable semiannually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits

shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

"T. Follett, President. Sam. Henshaw, Treasurer."

Judgment for plaintiff, and defendants except.[46]

WRIGHT, J. The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot, for the reasons: (1) That the instrument set out in the complaint, is neither in terms nor legal effect a negotiable promissory note, but a mere agreement; the indorsement in blank of the defendants, operating, if at all, only as a mere transfer, and not as an engagement to fulfill the contract of the railroad company in case of its default; and (2) that if it be a note, the notice of its dishonor was insufficient to charge the defendants as indorsers.

Whether the blank indorsement of the defendants imports any binding contract, depends on the law of Massachusetts; in which state it is to be assumed, from the facts in the case, that the original instrument and indorsement were made. But the law of Massachusetts does not differ from that of this state or of England in any particular material to the present inquiry. In Massachusetts there has been apparently a relaxation of the common-law rule so far as to extend the remedy against indorsers to notes payable absolutely in a medium other than cash; but in all other respects the legal rules applicable to negotiable paper, are the same in that state as in our own.

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an ageement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock, and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense

[46] The statement is abridged, and a part of the opinion omitted.

in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of $1,000 in four years from date, and its promise could only be fulfilled by the payment of the money, at the day named. * * *

Judgment affirmed.

ROBERTS v. SMITH et al.

(Supreme Court of Vermont, 1886. 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567.)

Assumpsit. Heard on demurrer to the declaration, December term, 1885; Walker, J., presiding. Demurrer overruled.

It was alleged in the amended count that the defendant "made and delivered to one J. S. King his promissory note in writing in words and figures as follows, to wit: 'November 17, 1849. Two years from date, for value received, I promise to pay J. S. King or bearer, one ounce of gold. E. P. Smith'—and thereby promised for value received to pay J. S. King, or bearer, one ounce of gold two years from date, which period has elapsed before the commencement of this suit. And said plaintiff avers that thereafterwards, to wit, on the 20th day of November, A. D. 1849, at Manchester aforesaid, the said J. S. King, for a valuable consideration to him, then and there paid by said plaintiff, then and there sold, assigned, and transferred said note, to said plaintiff, and said plaintiff then and there became and still is the sole and absolute owner of said note, of all of which defendant then and there had notice, and in consideration of the premises said defendant then and there specially promised the plaintiff to pay to the plaintiff the contents of said note according to the tenor and effect of the same; yet said defendant, though requested, has disregarded his said promise and has not paid the same." [47]

VEAZEY, J. Although it has long been settled in this state that a written contract having the usual form of a promissory note, but payable in some specific article, may be treated as a promissory note as to the form of declaring upon it, and the necessity of proof of consideration, and in some other respects (Rob. Dig. 92), yet such an instrument is not negotiable because not payable in money (Collins v. Lincoln, 11 Vt. 268; 1 Dan. Neg. Inst. 42).

The instrument declared upon was not even a promise to pay a given sum in specific articles, but only to pay "one ounce of gold." It stands, for consideration, upon the question of the sufficiency of the declaration, under the demurrer thereto, as though it were a promise to pay one bushel of wheat. This suit is by a purchaser from the payee. The plaintiff cannot stand upon the first count, as the instrument declared upon is not negotiable, and no promise by the defendant to the plaintiff is alleged. But the plaintiff relies mainly upon the

[47] Arguments of counsel are omitted.

new count, and claims to recover thereon as the assignee of a chose in action upon the special promise of the maker to pay the same to him.

The pleader sets out the instrument as a promissory note, and avers that the payee "for a valuable consideration" to him paid by the plaintiff, sold and transferred the note to the plaintiff, and that the latter became and is the sole and absolute owner thereof, of which the defendant had notice, and "in consideration of the premises" "specially promised the plaintiff to pay" to him "the contents of said note according to the tenor and effect of the same," etc.

If the instrument had contained a promise to pay a sum certain in specific articles, this count, so far as objection to it is urged on the ground of insufficiency of the averment of consideration for the defendant's promise, and of the consideration from the plaintiff to the original payee, King, would be good. Smilie v. Stevens, 41 Vt. 321; Moar v. Wright, 1 Vt. 57. But such is not the instrument. It is but a promise to pay; that is, deliver a certain article of merchandise definite in amount. Because gold enters into the composition of money, we cannot assume that "an ounce of gold" is money, or that it has a fixed and unvarying value. The contract in question lacks, not only the quality of negotiability, but certainty and precision as to the amount to be paid. Upon failure to perform there would be no definite specified sum due as in case of a promissory note. The declaration is drawn upon the theory that the instrument was a promissory note except in respect to negotiability. No value is alleged in the thing promised. The pleader claims to be entitled to the value of a commodity, without alleging it has any value. It is plainly impossible to apply to this paper a form of declaration adapted solely to a promissory note. Although it has the form of a promissory note, it is not such, and cannot be treated as such in pleading. It must be treated as a simple contract for the delivery of merchandise. As a declaration upon such a contract it is wanting in proper averments as to consideration, as to value, and as to breach and damages. Chit. Pl. tit. "Of the Declaration," *295 et seq.

Judgment reversed; first and amended counts adjudged insufficient; cause remanded.[48]

THOMPSON v. SLOAN et al.

(Supreme Court of New York, 1840. 23 Wend. 71, 35 Am. Dec. 546.)

This was an action of assumpsit, tried at the Erie circuit, in January, 1839, before Hon. Nathan Dayton, one of the circuit judges.

The suit was brought on a note made and dated at Buffalo, in this

[48] A bill or note payable in checks or exchange is not negotiable. First Bank v. Bank, 84 Tex. 40, 19 S. W. 334 (1892); First Bank v. Slette, 67 Minn. 425, 69 N. W. 1148, 64 Am. St. Rep. 429 (1897).

state, on the 8th of July, 1836, for $2,500, payable 12 months after date, at the Commercial Bank in Buffalo, in Canada money. The note was made by James Sloan and John Wilkeson, payable to the order of Johnson, Hodge & Co., which firm was composed of E. Johnson, P. Hodge and M. F. Johnson, by the latter of whom the note was indorsed in the name of the firm. The suit was brought against the makers and indorsers jointly. The declaration contained a special count upon the note, and also the common money counts. After proving the signatures of the defendants, the protest of the note and notice to the indorsers, the plaintiff's counsel offered to read the note in evidence, to which the defendant's counsel objected, insisting that, being payable in Canada money, it was not negotiable; that Canada money meant bills of the Canada banks. The plaintiff thereupon offered to prove that, at the time of the making of the note, Sloan and Wilkeson, the makers thereof, desired to have it drawn payable in Canada bank bills, but that he objected, and insisted that it should be made payable in Canada money, which testimony was objected to, and rejected. The plaintiff thereupon, under a written consent of the defendants, read in evidence a copy of an act of the provincial Parliament of Upper Canada, passed 20th April, 1836, fixing the weight and rate of certain gold and silver coins, and declaring that the same should pass current and be deemed a legal tender in the province, in payment of all debts and demands; as thus: "The British guinea, weighing five pennyweights nine and a half grains, Troy, at one pound, five shillings and six pence; the British sovereign, weighing, &c., at, &c.; the eagle of the United States of America, coined before, &c., weighing, &c., at, &c.; the eagle of, &c., coined since, &c., weighing, &c., at, &c.; the British crown at six shillings; the Spanish milled dollar, at, &c.; the dollar of the United States of America at, &c.; the Mexican dollar at," &c., and, after reading the same, rested. The counsel for the defendant then offered to prove the meaning of the words "Canada money," as generally understood at Buffalo by persons in trade there, which evidence was objected to by the plaintiff's counsel; but the objection was overruled by the judge, and the defendants thereupon called several witnesses, who proved that Canada money was understood at Buffalo to mean bills of the Canada banks. Upon which evidence the judge ordered a nonsuit to be entered. The plaintiff asks for a new trial.

COWEN, J. A promissory note must, in order to come within the statute, like a bill of exchange, be payable in money only, in current specie (Bayl. on Bills, 10 [Am. Ed. of 1836]; Ex parte Imeson, 2 Rose, 225); or at least in what we can judicially notice as equivalent to money. Accordingly a note payable in bills of country banks (Jones v. Fales, 4 Mass. 245), in Pennsylvania or New York paper currency, current in Pennsylvania or New York (Leiber v. Goodrich, 5 Cow. 186), in notes of the chartered banks of Pennsylvania, though

the note was made and payable in the state of Pennsylvania (McCormick v. Trotter, 10 Serg. & R. [Pa.] 94; see Cook v. Satterlee, 6 Cow. 108, 16 Am. Dec. 432), in paper medium (Lange v. Kohne, 1 McCord [S. C.] 115; see McClarin v. Nesbit, 2 Nott & McC. [S. C.] 519), or in cash or Bank of England notes (Ex parte Imeson, before cited, 2 Buck, 1 S. P.), has been held without the statute.

The farthest we have gone is to say that a note drawn and payable here, in New York bills or specie (Keith v. Jones, 9 Johns. 120), or in bank notes current in the city of New York (Judah v. Harris, 19 Johns. 144), is negotiable. In both cases the court went on the ground of a right to take judicial notice that New York bills, and especially bank notes current in the city of New York, were customarily considered and treated as equivalent to specie. And, in the last case, they said, though the defendant might have a right to pay with foreign bills current in the city the note was still to be regarded as payable in current money.

Admitting that the note in question imports an obligation to pay in gold and silver, current in Canada, I do not see, on what principle we can pronounce it to be payable in money, within the meaning of the rule. It is not pretended that coins current in Canada are, therefore, so in this state. As gold and silver they might readily be received, and so might the coin of any foreign country, Germany or Russia for instance; but the creditor might, and in many cases doubtless would, refuse to receive them, because ignorant of their value. In law they are all collateral commodities, like ingots or diamonds, which though they might be received and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would, therefore, be no more negotiable than if it were payable in cattle or other specific articles. The fact of Canada coins being current here is not, at any rate, so notorious that we can judicially notice them as a universally customary medium of payment in this state; and if not, they are no more a part of our currency than Pennsylvania bank bills. Leiber v. Goodrich, before cited. Nor do I perceive in the case any proof, or offer to prove, that such coins were of universal currency.

This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. Chit. on Bills, 615, 616 (Am. Ed. of 1839); Deberry v. Darnell, 5 Yerg. (Tenn.) 451. A note payable in pounds, shillings and pence made in any country is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an instrument is to aver and prove the value of the sum expressed, in our own tenderable coin. It is payable in no other (vide Bayl. on Bills, 23 [Am. Ed. of 1836], and the cases there cited); whereas on the note in question, Canada money, a specific article, would be a law-

ful tender. Canada coppers, for aught I see, and, under our own decisions, bank bills commonly current in Canada, would also be tenderable.

Nor is it necessary to deny that, had this note been made, indorsed, and payable in Canada, it would have been negotiable. It would then on its face have been payable in the current coin of the country where it was made. The objection is that the note was made, indorsed, and payable here, in a foreign commodity, which the payee was entitled to demand specifically, and to reject gold and silver current in the United States. It is of course the same thing under the extrinsic evidence offered by the plaintiff, and received by the judge. The Canadian statute merely proved what coins were current as Canada money, which could not be recognized as the money of this country. In the light of that proof, the note must be read as necessarily payable in Canada money, current by law in that province. It did not improve the case, without following it with some statute making that money, as such, current here; or, at least, showing that it was, in fact, so notoriously current among us, that we should be entitled to take judicial notice of the fact. The latter is the utmost that, by our cases, the plaintiff could claim; though we have gone farther than the cases decided in any other state or country, so far as they were cited on the argument, or have come under my observation, except a case in Tennessee. Deberry v. Darnell, 5 Yerg. 451. The instrument was payable in North Carolina notes, yet held negotiable. In McCormick v. Trotter, I fear we were somewhat justly criticised for the high ground on which we had placed all our state bills in Keith v. Jones. At any rate, Mr. Justice Duncan very truly reminded us that New York state bills had depreciated in common with those of Pennsylvania. A remark which he made as to the note in that case, which was payable in Pennsylvania bills, would, I apprehend, be nearly applicable to our own, at some stages of our currency, viz., that "it was payable in more than forty kinds of paper of different value." * * *

The motion to set aside the nonsuit, and for a new trial, is denied.[49]

[49] Arguments of counsel and a part of the opinion are omitted. In an action against the indorser of a note payable in Canada in "Canada currency" the court said: "In Thompson v. Sloan, the Supreme Court of New York held that a note payable in Buffalo in 'Canada money' was not negotiable. This, however, is not, as we think, in accordance with the general current of decision. Judge Story says: 'If it be payable in money, it is of no consequence in the currency or money of what country it is payable. It may be payable in the currency or money of England, France, Spain, Holland, Italy, America, or any country.' Story on Bills, § 43; Chitty on Bills, 153, 158. We cannot with any propriety refuse to recognize the right of every country to fix its currency, and it is impossible for any civilized government to exist without some legal standard of money. The only question here is whether a note payable in 'Canada currency' is or is not payable in money." Black v. Ward, 27 Mich. 191, 194, 15 Am. Rep. 162 (1873).

ST. STEPHEN BRANCH RY. CO. v. BLACK.

(Supreme Court of New Brunswick, 1870. 2 Hann. 139.)

This was an action on the following promissory note:

"$371.00. St. Stephen, 27th August, 1867.

"One year from date for value received, I promise to pay to my own order at the St. Stephen's Bank, three hundred and seventy one dollars, with interest, payable in U. S. currency.

"Wm. F. Black."

The note was indorsed by the defendant.

At the trial before ALLEN, J., it was proved that the term "U. S. currency" meant the currency of the United States of America. At the time of the trial, $100 in gold was worth $133⅓ of this currency.

A verdict was taken for the plaintiff for $279 (the amount in the currency of this province which would produce the amount of the note and interest in United States currency), with leave to move for a nonsuit on the ground that the writing was not a promissory note, not being for a sum certain.

Needham having obtained in Michaelmas term last a rule nisi: [50]

ALLEN, J., now delivered the judgment of the majority of the court. * * * It is said in Chitty on Bills, 133, that it is not necessary that the money payable by a note should be that current in the place of payment or where the bill is drawn; it may be in the money of any country whatever. And in Story on Prom. Notes, § 17, it is said that, "provided the note be for the payment of money, it is wholly immaterial in the money or currency of what country it is made payable." Is not this note for the payment of money only? And may it not be assumed that "United States currency" means the money of the United States, and that the note is for the payment of $371 of the United States. Act 58 Geo. III, c. 23, mentions the dollars of the United States, and makes them current in this province. Act 15 Vict. c. 85, uses the term "currency," and declares it to mean the current money of this province; and Act 23 Vict. c. 48, § 3, declares that the eagle of the United States coined after the 1st July, 1834, and of a certain weight, shall pass and be a legal tender for ten dollars, and the multiples and divisions thereof in the same proportion. This is a legislative recognition that the eagle of the United States and the divisions thereof are the coins, or, in other words, the currency, of that country. In Wharton's Law Dictionary, currency is defined to be bank-notes or other passing money issued by authority, and which are continually passing as and for coin. * * *

FISHER J. I have some doubts whether the note, the subject of this action, from its terms is a promissory note, and the different

[50] The statement is abridged, and the arguments of counsel and part of the opinion are omitted.

acts of assembly relating to legal tender and currency have rather increased them, as they speak of the eagle of the United States, of a dollar, and of currency, but refer to the dollar as consisting of one hundred cents, and the eagle is made a legal tender for ten dollars of one hundred cents. Now, the note in question for $371 was found to be equal to $279; or in other words, the $371 United States currency referred to in the note would only produce $279 if paid in the gold eagles of the United States or the multiples or divisions thereof. There appears to me to be a want of certainty, which I think essential to a promissory note. In order to get at the amount of the note in New Brunswick currency, it was necessary to prove the value of the greenback paper notes in circulation, which was said to be constantly varying. * * *

PER CURIAM. Rule discharged.

HOGUE v. WILLIAMSON.

(Supreme Court of Texas, 1893. 85 Tex. 553, 22 S. W. 580, 20 L. R. A. 481, 34 Am. St. Rep. 823.)

GAINES, J. This is a question certified to us for determination by the Court of Civil Appeals for the Third Supreme Judicial district. The certificate is as follows:

"The plaintiff, Hogue, brought suit against defendant, Williamson, upon a written obligation, which reads as follows: 'Saltillo, January 25, 1888. On or before May 1, 1888, I promise to pay C. C. Hogue, or order, one thousand Mexican silver dollars. Geo. S. Williamson. $1,000 Mex.' The petition alleges that on May 1, 1888, Mexican dollars were each worth 85 cents in 'American coin,' and plaintiff asks judgment for $850. He states in his petition that the note is payable in Mexican silver dollars. The defendant filed a general denial, and also averred in his answer under oath that the note sued on was given for money which the plaintiff had won from defendant in a game with cards, and was therefore illegal and void.

"Upon the trial in the court below the plaintiff put in evidence the written obligation sued on, and proved that on May 1, 1888, Mexican silver dollars were worth 80 cents each. The plaintiff then rested, and the defendant introduced no testimony. The court instructed the jury to return a verdict for defendant, which was done, and judgment entered accordingly. If the instrument sued on was a promissory note, this is error. Newton v. Newton, 77 Tex. 511, 14 S. W. 157.

"With this explanation, the Court of Civil Appeals for the Third Supreme Judicial District certifies and submits to the Supreme Court for decision as part of the law of this case, as a new or novel question, the following proposition: 'Was the burden of proof on the plaintiff, after the introduction of the instrument sued on, to show nonperform-

ance of its obligations by defendant? In other words, is the written obligation sued on a promissory note, obligating its maker to pay a certain sum of money; or is it an ordinary contract for the delivery of a certain commodity; and must the plaintiff, by affirmative testimony, show a breach of the contract?'"

We are of the opinion that the instrument in question is a promissory note. It is such in form and in substance, unless the fact that the sum payable is expressed in Mexican silver dollars should make a difference. Speaking of the sum for which a bill of exchange must be drawn, Mr. Chitty says: "It may be the money of any country." Chit. on Bills, 160. Judge Story says: "But, provided the note be for the payment of money only, it is wholly immaterial in the currency or money of what country it may be payable. It may be payable in the money or currency of England, or France, or Spain, or Holland, or Italy, or of any other country. It may be payable in coins, such as in pounds sterling, livres, tonnosis, francs, florins, etc., for in all these and the like cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par." Story on Prom. Notes, § 17. The same rule is distinctly laid down in 1 Daniel on Negotiable Instruments, § 58, and in Tiedeman on Commercial Paper, § 29b. In view of the opinion of these eminent text-writers, it is remarkable that we have found but two cases in which the question is discussed or decided.

In Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, it is held that a note made in Michigan, payable in Canada in "Canada currency," is payable in money, and is therefore negotiable. But in Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546, a note made in New York, and payable there in "Canada currency," was held not negotiable. The court, however, say: "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination or any other denomination being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin." This decision was made in 1840, and it is to be inferred that at that time the dollar was not a denomination of the lawful money of Canada. We also infer that when the Michigan case arose this had been changed, and the denomination of Canada money corresponded with that of the United States. Upon this theory it would seem that the cases may be reconciled. The language quoted from the opinion in Thompson v. Sloan, supra, indicates clearly that, if the money named in the note had been a denomination of Canada money, the ruling would have been different, unless, perchance, the word "currency" would have affected the question. The note we have under consideration is for Mexican silver dollars—coins recognized

by the laws of the United States as money of the republic of Mexico. Rev. St. U. S. § 3567 (U. S. Comp. St. 1901, p. 2376).

We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its maturity, he had made a prima facie case; and our opinion will be certified accordingly.

HATCH v. FIRST NAT. BANK.

(Supreme Judicial Court of Maine, 1900. 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.)

On exceptions by defendant. Assumpsit upon a certificate of deposit, issued to one Olive Hodge by the defendant bank, and claimed by the plaintiff as a gift by indorsement and delivery before the death of the donor. The case appears in the opinion.

SAVAGE, J.[51] This action is brought by the plaintiff as indorsee on a certificate of deposit of the following tenor:

"The First National Bank, Dexter, Maine, Jan. 6th, 1897. Olive Hodge has deposited in this bank five hundred and sixty dollars, payable in current funds to the order of herself on return of this certificate properly indorsed. Int. at 3% per annum if on deposit 6 mos. No. 2,236. C. M. Sawyer, Cashier."

The defendant requested the presiding justice to rule that the action could not be maintained by the plaintiff, as indorsee, for the reason that the certificate of deposit in question was not a negotiable instrument. The presiding justice declined so to rule, and the defendant excepted.

The defendant contends that the instrument is nonnegotiable for three reasons: First, because it was written payable in "current funds"; secondly, because of the clause, "Int. at 3% per annum if on deposit 6 mos.;" and, lastly, because of the condition of payment expressed in the words, "on return of this certificate properly indorsed."

That a certificate of deposit, as such, is a negotiable instrument is held by almost unanimous authority (2 Daniel on Negotiable Instruments, § 1702; Miller v. Austen, 13 How. 218, 14 L. Ed. 119), and is not here denied by the learned counsel for the defendant. They only contend against certain features in the certificate before us. This court, following universal authority, has recently defined a negotiable instrument to be one which runs to order or bearer, is payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency. Roads v. Webb, 91 Me. 406, 40 Atl. 128, 64 Am. St. Rep. 246. If the certificate in question

[51] The statement is abridged.

does not conform to these requirements, it must be held to be nonnegotiable.

The first objection is that it is not made payable in "money"; that "current funds," in which it is made payable, should not be judicially interpreted to mean "money." We do not think this contention should prevail. This subject has been discussed exhaustively by many courts, and the conclusions they have reached on the one side and the other are not in harmony. But we think that the modern and better doctrine is that the term "current funds," when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money, funds which are current by law as money, and that, when thus construed, a certificate of deposit payable in current funds is, in this respect, negotiable. It is well known that certificates of deposit are commonly made payable in "currency" or in "current funds," and we believe that the interpretation we have given is in accord with the universal understanding of parties giving and receiving these instruments; an understanding which we should resort to as an aid to interpretation, unless the words themselves fairly import some other meaning. Some courts hold that evidence may be received to show the meaning of the terms "currency," "current funds." But, in the absence of evidence, these courts come to opposite conclusions. For instance, in Iowa, the court holds that notes payable in currency are prima facie nonnegotiable, but that evidence may be received to prove that the word "currency" describes that which by custom or law is money, and thus the instruments may be shown to be commercial paper. Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244. On the other hand, in Michigan it was held that, where a certificate of deposit was made payable in currency, "prima facie, at least, that must be held to mean money current by law, or paper equivalent in value circulating in the business community at par." "Such, we think," said the court, "is the general signification, the fair import, and the ordinary legal effect of the term." Phelps v. Town, 14 Mich. 374; Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756.

Still other authorities hold that the terms "currency" or "current funds," used in commercial paper, ex vi termini mean money. Judge Campbell, in Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, after a critical examination of a mass of authorities, declared that, with few exceptions, "the general course of authority is in favor of the negotiability of paper payable in currency, or in current funds; and these decisions rest upon the ground that those terms mean money, as the necessity of having negotiable paper payable in money is fully recognized."

"The term 'funds,'" say the court in Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am. Dec. 284, "as employed in commercial transactions, usually signifies money. Then the term 'current funds' means current money, par funds, or money circulating without any discount." Respecting an instrument payable in "current funds," the Maryland court said: "The words 'current funds,' as used in the paper before us, mean

nothing more or less than current money, and, so construed, the instrument was negotiable." Laird v. State, 61 Md. 311. See, also, Miller v. Race, 1 Burr. 452, 1 Smith, Lead. Cas. 808. The Supreme Court of the United States had occasion, in Bull v. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97, to pass upon the negotiability of an instrument which had been made payable in "current funds." That court said: "Undoubtedly it is the law that, to be negotiable, a bill, promissory note, or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver or in such notes; and the term 'current funds' has been used to designate any of these, all being current, and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words." See Chrysler v. Renois, 43 N. Y. 209; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Telford v. Patton, 144 Ill. 611, 33 N. E. 1119. The case of Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773, holding that a certificate of deposit payable in currency is negotiable, is sometimes cited as distinguishing between "currency" and "current funds," but we think the distinction is more in language than in meaning, for the Wisconsin court, after carefully defining the term "currency," add: "This construction of the term 'currency' might perhaps properly be extended to the term 'current funds.' It must extend to the latter term whenever it is used in the legal sense of money."

Another contention of the defendant is that the certificate of deposit is not negotiable because it is not payable absolutely, but only contingently, "on return of this certificate properly indorsed." We think this is not such a contingency as affects the negotiability of the certificate. The language expresses no more than the law implies as the duty of the holder in the absence of any such stipulation. 2 Daniel on Negotiable Instruments, § 1707; Smilie v. Stevens, 39 Vt. 315.

Further, it is contended that this certificate is uncertain as to amount by reason of the interest clause, and therefore is not negotiable. No time of payment is mentioned in the certificate. It is accordingly payable on demand. If payment be demanded at any time within six months, the amount payable is certain; it is the face of the certificate. If payment be not demanded until after six months, the amount pay-

able is equally certain; it is the face of the certificate and interest to the time of payment. In this respect, the certificate is like a note payable at a time certain with interest at a specified rate from the date of the note, or from maturity if it is not paid at maturity. Such notes are held negotiable. As in the case of a note on demand or on time the time when it may be actually paid is uncertain, so it is uncertain when this certificate may be presented, and payment demanded. But whenever that may be, the sum to become absolutely payable upon it at any given time is ascertainable upon its face, and that is sufficient. Smith v. Crane, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20; Towne v. Rice, 122 Mass. 67; Hope v. Barker, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387; Crump v. Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; 1 Daniel on Negotiable Instruments, § 53. This disposes of the exceptions relating to the negotiability of the certificate.

At the trial the plaintiff claimed that Olive Hodge, when she indorsed the certificate, gave it to her as her property, and this the defendant denied. The defendant requested the presiding justice to instruct the jury that, "if it was a mere gift made by Olive Hodge to the plaintiff in manner aforesaid, it would not authorize her (the plaintiff) to demand payment of the balance remaining unpaid represented by the certificate, but still unpaid after her (Olive Hodge's) death," which request was refused, and exception was taken.

We do not think, upon the facts stated, that this exception raises any question of law. The bill of exceptions does not state what was the "manner aforesaid" in which the gift was made. It merely states that it was "a question in dispute between the parties" whether there was a gift or not.

If there was a gift—which was a question of fact, of course—the property in the certificate remained in the plaintiff both before and after the death of Olive Hodge.

Exceptions overruled.

SECTION 6.—PARTIES

(I) MAKER AND DRAWER

TAYLOR v. DOBBINS.

(Court of King's Bench, 1720. 1 Str. 399.)

In case upon a promissory note, the declaration ran, that the defendant made a note, et manu sua propria scripsit. Exception was taken, that since the statute he should have said that the defendant signed the note, but the court held it well enough, because laid to be

wrote with his own hand, and there needs no subscription in that case, for it is sufficient his name is in any part of it. I. J. S. promise to pay is as good as I promise to pay, subscribed J. S.

DRUMMOND v. DRUMMOND.

(Court of Session, Scotland, 1785. Mor. Dic. 1445.)

James Drummond subscribed as the acceptor of a bill drawn in these terms: "Against Martinmas next, pay to Anne Drummond, or order, the sum of 1035 merks, for value." But there was no subscription of the drawer.

It was objected by the other creditors of James Drummond that a bill not subscribed by the drawer, though accepted, could not be sustained as a ground of debt.

But as the creditor's name was inserted in the body of the bill in question, and thus there occurred all the essential requisites of a promissory note,

THE COURT repelled the objection.[52]

STOESSIGER v. SOUTH EASTERN RY. CO.

(Court of Queen's Bench, 1854. 3 El. & Bl. 549.)

Case against the defendant as common carrier for the loss of £9. 10s. On the trial, before Crompton, J., at the Westminster sittings in last Michaelmas term the following facts appeared:

The plaintiff was a commercial traveller in the employment of Gideon Goold named in the declaration who resided at Birmingham. A person named Cruttenden residing at Chatham being indebted to Goold to the amount of £11. 10s. gave to the plaintiff at Chatham, to be by him transmitted to Goold, an instrument of which the following is a copy:

"£11: 10: 0. Birmingham, Sept. 1852.

"Three months after date pay to my order the sum of eleven pounds 10s., value received.

"Mr. Cruttenden, Jeweller, &c., Chatham."

Across the face of this instrument was written: "Accepted payable at Bank. G. Cruttenden."

[52] Contra: Tevis v. Young, 1 Metc. (Ky.) 197, 71 Am. Dec. 474 (1858). But see the dissenting opinion of Simpson, J., in which he says: "The only parties to a bill of exchange between whom a direct undertaking exists are the acceptor and the payee. The former, by his acceptance, agrees to pay to the latter the amount of the bill according to its tenor and effect. Here such an undertaking existed; the acceptor agreed to pay the sum named in the instrument to the payee, and the latter, by his indorsement, transferred the benefit of this promise to the holder. What more was necessary to create a liability upon the parties? There is a direct promise to pay the money, and a transfer of that promise."

Goold was to complete this instrument, which was stamped with a two shilling bill stamp, by signing his own name as drawer. The plaintiff had no authority to draw or accept bills for Goold. He accordingly enclosed the document, together with gold and silver to the amount of £9. 10s., on account of a private debt of his own to Goold, in a parcel, which he directed to Goold at Birmingham, and delivered to defendants, at their station at Strood, to be carried, and which they received for that purpose. There was affixed, in a conspicuous part of the office where the parcel was received, a notice, requiring an increased rate of charge, according to St. 11 Geo. IV & 1 Wm. IV, c. 68, §§ 1 and 2, for the articles specified in section 1. No notice of the value or contents of the parcel was given, nor any increased rate paid or agreed for. The cash was abstracted from the parcel, by some means which did not appear, before it reached Goold; the remainder of the contents came safely to hand.

On this evidence, the counsel for the defendants contended that the parcel contained, within the meaning of the carriers' act (St. 11 Geo. IV & 1 Wm. IV, c. 68, § 1, gold or silver coin of the realm, and a bill, note, or security for payment of money, or writing, the value of the whole exceeding £10., and that, no notice of the value or contents having been given, or increased rate paid or contracted for, the defendants were not liable for the loss. The plaintiff's counsel contended that the document, being incomplete, was of no value as a security or writing, and that therefore the parcel contained no articles, within the meaning of the statute, of the value of more than £9. 10s. The learned Judge directed a verdict for the plaintiff for £9. 10s., reserving leave to move to enter the verdict for the defendant if the skeleton bill was an article within the carriers' act, and was of such a value as to make together with £9. 10s. more than £10. It was agreed that the jury were to be taken as finding, so far as it was a question for them, that the writing was of no value.

In last Michaelmas term, Willes obtained a rule nisi accordingly.[53]

Lord Campbell, C. J. I am of opinion that this rule ought to be discharged. The case of the defendants is clearly untenable unless this paper can be brought within section 1 of the carriers' act (11 Geo. IV & 1 Wm. IV, c. 68. It must be shown to be a bill, order, note, or security for payment of money, or writing, of such value as to make up, with the £9. 10s., more than £10. It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be the bearer; that Cruttenden should become liable generally to the bearer was quite contrary to his intention. Nor is it a security for money; for we must look at the time of the delivery to the carrier; and at that time nothing could be claimed on it. I think it is a writing; it would be very difficult to define a writing so as not to include this paper. Then the question is as to

[53] The statement is abridged, and the arguments of counsel are omitted.

the value. If this writing possess any value beyond that of the paper material, that value must be £11. 10s. Now can it be said that the writing bore that value at the time of its delivery to the carrier? I do not see that it was of intrinsic value to any person. It empowered a particular individual to claim to that amount, by putting his name to it; but that had not been in fact done by the individual, Goold. I cannot agree that the executors of Goold could have made it valuable by putting to it his name, or their own, or any name whatever. Nor could any one have bestowed value on it, who, not being contemplated by Cruttenden, had found it. It is therefore in entire accordance with all the authorities, to hold that this writing was of no value at the time of its delivery to the carrier.

WIGHTMAN J. The question is, whether that which beyond all doubt was a writing was, at the time of its delivery to the carrier, of a value exceeding £10. The fallacy of the argument lies in attempting to make the power of conferring the value at the end of the destined carriage the criterion of the value at the time of the delivery. I think the rule should be discharged.

ERLE, J. I am of the same opinion. This being an imperfect instrument, and not a complete bill, order, note, or security for money, but clearly a writing, we are not bound to say that, in point of law, it was of value. I use that expression, because it may be that, this being, except for the absence of the name of the drawer, an accepted bill of exchange, a jury may in a similar case find that the writing is of value; and I do not wish to preclude myself from considering whether such a finding might not be sustained.

CROMPTON, J. I am of the same opinion; and I have no remarks to add. Rule discharged.

SIFFKIN v. WALKER & ROWLESTONE.

(Nisi Prius, before Lord Ellenborough, C. J., 1809. 2 Camp. 308.)

Action on a promissory note in the following form:

"Two months after date I promise to pay J. Siffkin or order £300. for value received. Thos. Walker."

The declaration stated that the defendants made their certain promissory note, which was signed by Walker for himself and Rowlestone, whereby they promised to pay, etc.

Park, in opening the case, undertook to show that the defendants were jointly indebted to the plaintiff on a charter party of affreightment, to the amount of £300. and that the note declared upon was given by Walker in satisfaction of this debt.

Lord ELLENBOROUGH. I think your remedy was either jointly against both defendants on the charter party, or separately against Walker on the promissory note. How can I say that a note made

and signed by one in his own name is the note of him and another person neither mentioned nor referred to?

Park contended that the note was set out in the declaration according to its import and legal effect; that Walker had authority to bind Rowlestone for this debt, and that the presumption of law was, that he had done so, although Rowlestone's name was not introduced. It was universally acknowledged that any number of partners might be bound by a note drawn in the partnership firm; and the legal consequence must be the same if a note be given for a partnership debt, whether the phrase "& Co." be employed or not.

Lord ELLENBOROUGH. The import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and I must treat this note as a separate security for a joint debt.

Plaintiff nonsuited.[54]

LEADBITTER v. FARROW.

(Court of King's Bench, 1816. 5 Maule & S. 345.)

Assumpsit upon a bill of exchange and the money counts. Plea, non assumpsit. At the trial before Lord Ellenborough, C. J., at the London sittings after last Hilary term, there was a verdict for the plaintiff, damages £50., subject to the opinion of the court upon the following case:

The plaintiff and defendant, at the time of drawing the bill in question, resided at Hexham. The defendant, who was a tanner, was also agent of the Durham Bank, in which capacity he acted from July, 1812, to July, 1815, when the bank failed. On the 8th of June, 1815, the plaintiff sent £50. to the house of the defendant, in order to procure a bill upon London for the amount, and the defendant filled up and signed the bill in question upon one of the printed forms of the Durham Bank, and sent it to the plaintiff. The following is a copy of the bill:

"N. G. 205. £50. Hexham, June 8, 1815.

"Forty days after date, pay to the order of Mr. Thomas Leadbitter fifty pounds, value received, which place to the account of the Durham Bank, as advised.

"Messrs. Wetherell, Stokes, Mowbray, Hollingsworth, & Co., Bankers, London. [Signed] Christr. Farrow."

The persons who constitute the firm upon which the bill was drawn are the same who constitute the firm of the Durham Bank, that bank having a house in London, upon which they were in the habit of drawing bills, which they wished to make payable there.

The bill in question was drawn in the same form as had been used

[54] Accord: Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064 (1906); N. Y. Life Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 362 (1907).

by the defendant since June, 1813, before which time he had been in the course of issuing bills drawn in the name of one of the partners of the Durham Bank. He did not draw bills on his own account in this form, nor upon the same parties. The plaintiff, when he sent the £50, and obtained the bill, knew that the defendant was agent of the Durham Bank at Hexham, and that the Durham Bank drew upon a house in London, and he supposed that the bill was given by the defendant, as agent, and on account of the Durham Bank, to which the defendant paid over the £50. The bill, when due, was presented to the drawees, and payment refused, and due notice was given to the defendant.

The question for the opinion of the court was, whether the plaintiff was entitled to recover.[55]

Lord ELLENBOROUGH, C. J. Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, "I am the mere scribe," he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham Bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done, and, therefore, has made himself liable. I do not say whether an action would lie against the Durham Bank, because, considering it in either way, it would not, as it seems to me, affect the liability of the defendant.

BAYLEY, J. I am entirely of the same opinion. The drawer, by the act of drawing, pledges his name to the bill's being duly honoured; and though the plaintiff in this case knew that the defendant was an agent, he might also know that he had given this pledge.

ABBOTT, J. I am also of the same opinion. The party does not show that the bill was not taken according to the effect which it bears on the face of it.

HOLROYD, J. I apprehend that no action would lie on the bill, except against those who are the parties to it.

Judgment for the plaintiff.[56]

[55] Arguments of counsel are omitted.

[56] As to the liability of the agent where he signs the instrument per procurationem, or "X., by A., Agt.," or the name of the principal simply, but is unauthorized, see White v. Madison, 26 N. Y. 117 (1862), an action for breach of warranty of authority, and West London Bank v. Kitson, 13 Q. B. D. 360 (C. A. 1884), an action of deceit.

As to the liability of the principal in such case, see Reid v. Rigsby, [1894] 2 Q. B. 40, an action for money had and received, and In re Cunningham, 36 Ch. Div. 532 (1887).

MANUFACTURERS' & TRADERS' BANK v. LOVE.

(Supreme Court, Appellate Division, Fourth Department. 1897. 13 App. Div. 561, 43 N. Y. Supp. 812.)

Appeal by the plaintiff, the Manufacturers' & Traders' Bank, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 29th day of February, 1896, upon the decision of the court rendered after a trial at the Erie Trial Term before the court without a jury, dismissing the complaint upon the merits.

The action was brought to recover of the defendant upon a promissory note which reads as follows:

"$201.93. Buffalo, N. Y., May 3, 1895.

"Two months after date, I promise to pay to the order of Rice-Blake Lumber Company two hundred one and 93-100 dollars. Value received. At Bank of Buffalo, here.

"[Signed] J. W. Johnston, Agent."

This note was executed by Johnston to the payees therein named for lumber purchased of them. Johnston was conducting a lumber business in Buffalo. The payee indorsed and transferred this note to the plaintiff for value, before it was due. The defendant resided in Elmira, and was a stepdaughter of Johnston's.[57]

WARD, J. Whatever may be the rule as to other contracts not under seal, the law is firmly established in this state as to commercial paper that persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. Briggs v. Partridge, 64 N. Y. 363, 21 Am. Rep. 617, and cases there cited; Cortland Wagon Co. v. Lynch, 82 Hun, 173, 31 N. Y. Supp. 325; Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705. It is also held that the negotiable instrument binds only the ostensible maker, though the word "Agent" is attached to his signature; no principal being named in the body of the instrument, or indicated by the signature. See the last two cases cited.

The law merchant surrounds the negotiable paper in the hands of a bona fide holder with a credit not given to other contracts, and protects him against hidden equities of which he has no notice, and permits him to recover against the party whose name is signed to the instrument, though there be attached to his name the word "Agent"; and he is not bound to search for a principal unknown to the instrument itself, nor can he do so. The rights of the holder are confined to the parties to the instrument, and he must rely upon them alone, except that he can establish that the name used as the signature to the instru-

[57] The statement of the case is abridged.

ment has been adopted by the assumed principal, or by the person not named in the instrument, as his own, in transacting the business. This may be done. A person may become a party to a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name, and he intends to be bound by it. De Witt v. Walton, 9 N. Y. 574; Daniel on Neg. Inst. § 304. The last-quoted authority says: "But such liability exists only where it is affirmatively and satisfactorily proved that the name or signature thus used is one which has been assumed and sanctioned as indicative of their contract, and has been with their knowledge and consent, adopted as a substitute for their own names and signatures in signing bills and notes."

No authority is given in the written instrument filed from the defendant to use the signature of "J. W. Johnston, Agent," as and for the defendant; nor is there any proof that, in fact, the defendant had authorized the use of that name as representing her in the business; and the case seems to stand upon the bare proposition that although neither the plaintiff nor the lumber company had knowledge of the instrument filed in the clerk's office, and in no manner relied upon it, and had no knowledge, in fact, that the signature to the note in any manner represented the defendant, still the plaintiff had a right to go outside of the instrument, and explore for some undiscovered principal that the simple addition of "Agent" to Johnston's name might indicate, and, having found this instrument on file, could stand upon that and recover. We cannot concur in this view.

The appellant claims, also, that it was error to permit Johnston to testify that the defendant never had any interest in the business, and received no profits therefrom, and that a revocation of the agency was made in March, 1895, but not filed, over the objection of the plaintiff. The plaintiff had made Johnston its witness, and had gone into the relations existing between him and the defendant; and the court permitted him to testify on cross-examination, to the matter objected to. Upon the facts we have narrated, if the reception of this evidence were error, it could not affect the result, as the defendant was not liable in any event so far as the case discloses, and it is therefore unnecessary to consider the matter further.

We have reached the conclusion that the decision of the trial court was right, and that the judgment should be affirmed.

TARVER v. GARLINGTON et al.

(Supreme Court of South Carolina, 1887. 27 S. C. 107, 2 S. E. 846, 13 Am. St. Rep. 628.)

SIMPSON, C. J. The action below was commenced for the recovery of a certain sum of money alleged to be due the plaintiff from defendants. The complaint was, in substance, as follows, to wit:

That the defendants, through their agent, S. D. Garlington, made their note in writing, whereby they promised to pay the plaintiff, or order, $460 on the 1st day of November, 1884, with interest at 7 per cent., a copy of which note was attached to the complaint, and, after the usual allegations of ownership and nonpayment, judgment was demanded for said amount. The copy of note attached was as follows: "$460. On the 1st day of November next I promise to pay Samuel J. Tarver, or order, four hundred and sixty dollars, for value received, with interest from date at the rate of seven per cent. per annum. Witness my hand and seal this March 22, 1884. [Signed] S. D. Garlington, Agent."

The defendant George F. Young put in an answer denying that Garlington was his agent, and denied the alleged indebtedness. The time for Mary Garlington had not expired, and she had not answered, at the ensuing court. When the case was called, and the complaint and answer of George F. Young read, he interposed an oral demurrer that the complaint did not state facts sufficient to constitute a cause of action, which his honor, Judge Aldrich, sustained, dismissing the complaint, with costs, as to the defendant George F. Young, with leave, however, to the plaintiff to amend his complaint. From this order this appeal is before us.

The ground upon which the demurrer was interposed, and upon which, as we suppose, it was sustained, was that a party could not be bound as principal upon a note where it was signed by another simply as "Agent," as this note was signed; that under the law applicable to such cases, involving the doctrine of agency, before one could be held liable as principal upon a note or other contract, his name should appear in some form upon the face of the paper, so that from the paper itself the principal could be ascertained; and that, in the absence of such fact, parol testimony was incompetent to discover or develop it. And the defendant contends here that inasmuch as the note sued on, as shown by the copy attached, was signed by "S. D. Garlington, Agent," without specifying for whom he was agent, either in the body of the note or attached to the signature, and inasmuch as parol testimony would not be allowed to explain away or remove this difficulty, therefore the facts stated in the complaint fail to show a cause of action.

The principle relied on by respondent is no doubt correct. In fact, at one time in this state, this doctrine was carried much further than that contended for here. See the case of Fash v. Ross, 2 Hill, Law, 294, where it was held that the agent signing his name for another, although the name of the other was mentioned thus, "A. B. for C. D.," was not sufficient. This case was, however, overruled, with the cases that had followed it, by the case of Robertson v. Pope, 1 Rich. Law, 503, 44 Am. Dec. 267; and now the doctrine as to unsealed contracts, negotiable notes, etc., is as stated by the respondent, to wit: That the name of the principal must appear on the paper, so that from the paper

itself the principal can be known. This is the general rule, and it is said by some that to this rule there is no exception. In a note to Parsons on Notes and Bills, p. 92, however, it is stated that there is at least one exception, apparent, if not real, to wit, where the principal carries on business in the name of the agent. In that case the name of the agent is the name of the principal pro hac vice. Bank of Rochester v. Monteath, 1 Denio (N. Y.) 402, 43 Am. Dec. 681. In the case of Hicks v. Hinde, 9 Barb. (N. Y.) 528, where one had drawn a draft in his own name, styling himself simply "Agent," without more, it being known at the time by all of the parties for whom he was acting as agent, it was held sufficient to charge his principal. It is true, however, that in that case a distinction was drawn between a draft and an ordinary note or contract.

The principle upon which it has been held that, where the name of the principal appears anywhere on the note, the agent himself is relieved from liability, and liability attaches to said principal, is that the principal is known at the time of the contract, and the contract is really made with him. It was upon this principle that Fash v. Ross, supra, was overruled by Robertson v. Pope, supra, thus differentiating ordinary unsealed contracts from the technical rule governing sealed contracts in this respect. And in the case of Robertson v. Pope, supra, Judge O'Neall said the proof was abundant that Byers (the party who signed the note, thus, "for Nath'l Pope, Sam'l Byers") "was the agent of Byers, and that Pope received half of the cattle bought for Neuffer and him." Neuffer was the other maker of the note sued on. And it seems that parol testimony was received in that case to show that Pope was a principal in the note.

Now, in the case before us, the question how far parol testimony may be allowed to come in, to explain and to fix the application of the term "agent," as used here, has not been adjudicated by the court below; at least, there does not appear any distinct and positive ruling on this question by his honor. He simply and in short form sustains the demurrer. This question, then, not being strictly before us, we pass it by. The case comes up on demurrer to a complaint, in which plaintiff alleges that the defendants, through their agent, on a note signed by said agent in his own name, "Agent," promised to pay him $460. Under the rules of law and evidence, it may be that the plaintiff would not be allowed to go beyond the face of the note, and prove by parol that S. D. Garlington, in signing this note, promised for and as agent of the defendants, as alleged in the complaint; and, if the case had gone to the jury, it may be that, such parol evidence being excluded, the plaintiff would have failed in his action. But here the defendant admits the truth of the allegations, to wit, that S. D. Garlington had promised for him, and as his agent, to pay said money. He admits the agency, admits the promise, and that it was made by the note, a copy of which is attached. In other words, so far as the demurrer is concerned, he waives his right, if he has any, to exclude parol tes-

timony on the question of the agency, and admits it. Upon these facts admitted, the question of law is raised for the judge; whereas, if the case was before the jury, the first question would be, has the agency been established? Upon the face of the paper, unexplained by parol testimony, the jury would be compelled, under the cases above, to answer in the negative. But before the judge, with the agency not even disputed, but actually admitted, it seems to us, it was error to hold that there was no cause of action.

It appears that there is at least one exception to the general rule above stated. Note to Parsons, supra, p. 95. Non constat but the plaintiff may be able to bring his case under that exception. Besides, the plaintiff should have the right to test the question how far parol testimony may be admitted in a case of this kind.

It is the judgment of this court that the judgment of the circuit court be reversed.

STURDIVANT et al. v. HULL.

(Supreme Judicial Court of Maine, 1871. 59 Me. 172, 8 Am. Rep. 409.)

On exceptions to the ruling of Goddard, J., of the superior court for the county of Cumberland, at the November term, 1870.

BARROWS, J. Assumpsit by the payees against the maker of a promissory note of the following tenor:

"$225.00. Portland, Dec. 20, 1869.

U. S. I. R. Stamp. 25 cents.

"Four months after date I promise to pay to the order of Sturdivant & Co. two hundred and twenty-five dollars. Payable at either bank in Portland, with interest. Value received.

"John T. Hull, Treas. St. Paul's Parish."

The signature to the note was not denied, but the defendant offered to prove, and if evidence dehors the note is admissible for that purpose, we must consider it as proved, that at the time the note was made defendant was treasurer of St. Paul's parish, and made the note in suit, in behalf of said parish and for their sole benefit, in renewal of a former note given by his predecessor, Moody, for lumber used in building their parish church, and that defendant never received any personal consideration or any consideration for the note, other than the foregoing, and that these facts were known to the plaintiffs when the note was given, and that the understanding and intention of both parties, then, was that it was the note of the parish and not of the defendant.

As the suit is between the original parties to the note, it follows that if the proffered evidence showed that there was no valid consideration for the defendant's promise, it should have been admitted. But such is not the case. It is not necessary that the consideration should

have inured to the personal benefit of the promisor, and the surrender of the previous note or the extension of the term of credit originally given to the parish for the lumber would, either of them, be a sufficient consideration for the defendant's note.

The case presents but two questions:

(1) Whether the defendant's liability must be determined solely by the written instrument which he has subscribed, excluding the evidence above offered to control its construction?

(2) If so, does the true construction of it make it his note, or that of the parish?

I. Now, when parties are competent witnesses, and stand ready to testify (if allowed) not only to their own intentions but to those of the other party to the contract, the wisdom of the long-established rule, which requires all parties to written contracts, at their peril, to state what they mean to abide by in the writing itself, and prohibits them from resorting to oral testimony to contradict or vary its terms, grows more apparent every day.

One of the illustrations of this rule, given by Mr. Greenleaf in his treatise on Evidence (Volume 1, p. 320, Ed. 1842), citing Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150), runs thus: "Where one signed a promissory note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of another, on whose property he had caused insurance to be effected by the plaintiff, at the owner's request."

When a man has deliberately said, in writing, "I promise to pay," and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract and to undertake to prove that he did not actually mean, "I promise," but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment.

It is better that a careless or ignorant agent shall sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony.

And upon this point the decisions (although, in cases of like type with this, they are somewhat conflicting, or, at least, distinguished with scarcely a shade of difference, upon the question of the construction of the instrument itself) will be found concurring. Andrews v. Estes, 11 Me. 270, 26 Am. Dec. 521; Hancock v. Fairfield, 30 Me. 299; Slawson v. Loring, 5 Allen (Mass.) 342; Draper v. Mass. Steam Heating Co., 5 Allen (Mass.) 338; Barlow v. Cong. Soc. in Lee, 8 Allen (Mass.) 460; Tucker Manuf. Co. v. Fairbanks, 98 Mass. 104, and cases there cited.

Nor is this wholesome rule abrogated by any of our statute provisions touching the responsibility of principals upon contracts made and executed by their authorized agents. * * *

The defendant's liability must be ascertained by an examination of the note itself.

II. As has already been suggested, the cases involving the construction of similar instruments are more difficult to reconcile than those in which the point just disposed of has been considered. Apparently slight changes in the phraseology have affected the construction adopted by different courts, and by the same court in different cases. There is a necessity for a careful examination and comparison of the numerous decisions. This we have endeavored to make, and the result is, we are satisfied that the weight of reason and authority demonstrates that this is the personal contract of the defendant and not that of the parish of which he was treasurer.

There are no appropriate words in it to show that it was the contract of the parish, or that it was made by the defendant in its behalf. He does not say that he promises as treasurer, or use any language significative of an intention to bind his successors in office as in Barlow v. Cong. Soc. in Lee, in which case Mann v. Chandler, a per curiam opinion reported 9 Mass. 335, is disavowed as an authority, and it is said that "all the decisions of this court upon unsealed instruments, since the case of Mann v. Chandler, have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter." Vide 8 Allen (Mass.) 461, 462, 463.

In Haverhill M. F. Ins. Co. v. Newhall, 1 Allen (Mass.) 130, upon a note signed, "Cheever Newhall, President of the Dorchester Avenue Railroad Company," though it was agreed that the defendant, at the time of signing the note, was the president of said company, that it was given in consideration of a policy of insurance issued by the plaintiffs to that company, upon property owned by them, and that the defendant was duly authorized by the company to obtain the insurance and sign the note, it was held that the form of the note only was to be looked at upon the question of charging the defendant, that he had fixed a personal liability upon himself by the use of the words, "I promise to pay," and that this liability was not affected by the descriptive addition to his signature.

In Fiske v. Eldridge, 12 Gray (Mass.) 474, the note was signed, "John S. Eldridge, Trustee of Sullivan Railroad," and the defendant was held personally liable, though he proved that he was trustee of the railroad company, and as such had entire charge of its property and business, and gave the note in suit to take up a promissory note of the corporation, and delivered with it bonds of the corporation as collateral security for its payment.

The defendant's counsel relies upon certain dicta intimating that the case of Mann v. Chandler may be sustained, because the defendant there, as here, was treasurer of the corporation, and that the signature of that officer may be thought, of itself, to import a promise of the party whose treasurer he is.

But we should be unwilling to say that the treasurer of a religious corporation has any authority by virtue of his office to bind such corporation by the issue of negotiable promissory notes, or that the official signature of such treasurer could be considered as indicating the assertion of such authority, any more than the signature of a person describing himself as president or trustee of a business corporation asserts the requisite authority on the part of such president or trustee.

In Mann v. Chandler, relied on by the defendant, the special authority conferred by the directors upon the treasurer to give the note in suit was shown, and in the more recent cases above cited, from 12 Gray and 1 Allen, such authority was either admitted or proved without objection. But the tendency of the later decisions, manifestly, is to hold the man who says, "I promise to pay" (without stating in the writing itself that he promises for or in behalf of any other party), responsible personally. Why should it not be so? That is the plain and direct import of the language he uses. "I" is not the language of a corporation or an association. It is that of an individual signer. If such signer appends to his signature a description of himsef as agent, president, trustee, or treasurer of a corporation, it may import a declaration on his part that, having funds of such corporation in his possession, he is willing to be responsible, and accordingly makes himself responsible, for a debt of theirs.

And this descriptio personæ may aid him in the keeping and adjustment of his accounts with his different principals.

But without some words in the contract importing that he promises for or in behalf of his principal, he cannot avoid the personal liability he has thus assumed.

In Seaver v. Coburn, 10 Cush. (Mass.) 324, the contract signed by defendant as "Treasurer of the Eagle Lodge," etc., was held binding upon him personally. And the distinction which the defendant seeks to set up, between treasurers and other officers and agents of corporations, was ignored.

The fact that it has been suggested as a possible ground upon which the case of Mann v. Chandler (so often doubted, and so recently denied to be an authority in the court which pronounced it) might be sustained can hardly be expected to avail the defendant here.

This subject has been elaborately discussed in Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101, and in Barlow v. Cong. Soc. in Lee, 8 Allen (Mass.) 460, and what we have already said may seem superfluous. * * *

Judgment for plaintiffs.[58]

[58] Part of the opinion is omitted.

KEIDAN v. WINEGAR.

(Supreme Court of Michigan, 1893. 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705.)

McGRATH, J. Plaintiff had judgment upon the following promissory note: "$336.96. Grand Rapids, Mich., Dec. 22, 1887. Ninety days after date, I promise to pay to the order of Geo. Keidan three hundred thirty-six and 96-100 dollars at the Old National Bank of Grand Rapids, Mich., value received, with interest at the rate of eight per cent. per annum until paid. W. S. Winegar, Agt."

Defendant, with his plea, filed an affidavit setting forth "that the note, a copy of which is attached to the declaration in said cause, and served upon said deponent, with a copy of said declaration, is not the note of this deponent, defendant as aforesaid; and he denies the same and the execution thereof, and says that he, said defendant, is not indebted to said plaintiff upon said note, nor for any part thereof, nor is he indebted to said plaintiff in any sum whatever, nor in any manner whatever."

Upon the trial defendant offered to show that in 1884, before plaintiff had any dealings with defendant, plaintiff was informed that defendant was carrying on business as the agent of Maggie G. Winegar, and was not doing business for himself; that business relations were then established between plaintiff and said Maggie G. Winegar; that said business relations continued from the early part of 1884 to and including the year 1887, and embraced many transactions between plaintiff and Maggie G. Winegar; that many instruments were made between the parties, which were signed exactly as the note sued upon is signed, and that this form of execution had come to be recognized and adopted between the parties as binding Maggie G. Winegar; that during that time no business was transacted by the defendant in his individual capacity, and all the business done was that of his principal, and known and understood to be such by plaintiff; that the said note was given and accepted as the obligation of Maggie G. Winegar; that the note was given for duebills and goods furnished by plaintiff to Maggie G. Winegar, and such duebills and goods were by plaintiff charged to said Maggie G. Winegar on the books of plaintiff; that the taking of these notes did not in the least change the character of the indebtedness; and that defendant never received any benefit or consideration for said note. The court refused to admit the testimony, and directed a verdict for the plaintiff.

The clear weight of authority is that the promise in the present case is prima facie the promise of William S. Winegar, and, as between one of the original parties and a third party, the addition of the word "agent" is not sufficient to put such third party upon inquiry. The question here, however, is whether, as between the imme-

diate parties to the instrument, parol evidence is admissible to show the real character of the transaction. In his excellent work on Agency, Mr. Mechem lays down the general rules, which we think are sustained by reason and authority. Mechem, Agency, par. 443. * * *

In Metcalf v. Williams, 104 U. S. 93, 98, 26 L. Ed. 665, Mr. Justice Bradley says: "The ordinary rule, undoubtedly, is that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' or 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere descriptio personæ. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligation, contrary to the intent of the parties."

In Kean v. Davis, 21 N. J. Law, 683, 687, 47 Am. Dec. 182, Chief Justice Green says: "The question is not, what is the true construction of the language of the contracting party; but, who is the contracting party? Whose language is it? And the evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability; not to aid in the construction of the instrument, but to prove whose instrument it is. Now, it is true that the construction of a written contract is a question of law, to be settled by the court upon the terms of the instrument. But whether the contract was in point of fact executed, when it was made, where it was made, upon what consideration it was made, and by whom it was made, are questions of fact, to be settled by a jury, and are provable in many instances by parol, though even the proof conflicts with the language of the instrument itself."

In Hicks v. Hinde, 9 Barb. (N. Y.) 528, where an agent drew a bill on his principal for a debt due from the principal to the payee, adding the word "agent" to his signature, and the payee knew that the drawer was authorized by his principal to draw the bill as his agent, and it was the understanding of all parties that the drawer signed only as agent, and not with a view of binding himself, it was held that the drawer was not personaly liable on the bill. * * *

As is so often said, it is the intent of the parties which is to be carried out by the courts. The rule that rejects words added to the signature is an arbitrary one. Its reason is not so much that the words are not, or may not be, suggestive, but that they are but suggestive, and the instrument, as a whole, is not sufficiently complete to point to other parentage. The very suggestiveness of these added words has given rise to an irreconcilable confusion in the authorities as to the

legal effect of such an instrument. Extrinsic evidence, therefore, is admissible in such case, between the immediate parties, to explain a suggestion contained on the face of the instrument, and to carry out the contract actually entered into as suggested, but not fully shown, by the note itself. The presumption that persons dealing with negotiable instruments take them on the credit of the parties whose names appear should not be absolute in favor of the immediate payee, from whom the consideration passed, who must be deemed to have known all the facts and circumstances surrounding the inception of the note, and with such knowledge accepted a note containing such a suggestion. In the case of Tilden v. Barnard, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 376, under a state of facts similar to those offered to be shown here, it was held that defendants there were not liable.

We think that in the present case defendant was entitled to make the showing offered. Under the general issue, defendant was entitled to give in evidence any matter of defense going to the existence of any promise having legal force, as against him. 1 Shinn, Pl. & Pr. § 740.

The judgment is reversed, and a new trial ordered.[59]

FIRST NAT. BANK OF BROOKLYN v. WALLIS.

(Court of Appeals of New York, 1896. 150 N. Y. 455, 44 N. E. 1038.)

Appeal from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered September 10, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court. Since the taking of the appeal William T. Wallis has died, and the action has been continued in the name of George T. Smith.

This action was upon a promissory note in the following form: "$1,100. Jersey City, N. J., Jan. 20, 1893.

Wallis Iron Works.

Three months after date, we promise to pay to the order of H. Stuetzer & Co. eleven hundred dollars at the First National Bank of Jersey City, value received.

"William T. Wallis, President.
"George T. Smith, Treasurer."

On the day of its date the note was presented by the defendant Herman Stuetzer, one of the members of the firm to whom it was payable, to the plaintiff for discount, and it was discounted by the plaintiff and the proceeds paid to Stuetzer.

When the note was discounted no knowledge had been communicated to the plaintiff respecting the purpose for which the note was

[59] Part of the opinion is omitted.

given. The discount was made on the faith of Stuetzer, without inquiry or knowledge whether it was the note of the Wallis Iron Works or the individual note of the defendants Wallis and Smith, except what appeared upon the face of the note.

The defense was that the note was the obligation of the Wallis Iron Works, not that of defendants.[60]

ANDREWS, C. J. The character of the plaintiff as a bona fide holder of the note is not affected by any misconception it may have been under when it discounted it, as to the legal import of the promise; that is to say, whether the note was the obligation of the Wallis Iron Works, or of the persons who signed it in their individual names, with the addition of the names of their respective offices. The bank discounted the note at the request of its customers, the payees, before maturity, paying full value, without inquiring as to the nature of the principal obligation, and it is entitled to enforce it against the defendants as individuals, if on its face it was their promise, and not the promise of the corporation of which they were officers. It may be admitted that if the bank, when it discounted the paper, was informed or knew that the note was issued by the corporation, and was intended to create only a corporate liability, it could not be enforced against the defendants as individuals, who, by mistake, had executed it in such form as to make it on its face their own note and not that of the corporation.

But, according to the rules governing commercial paper, nothing short of notice, express or implied, brought home to the bank at the time of the discount, that the note was issued as the note of the corporation, and was not intended to bind the defendants, could defeat its remedy against the parties actually liable thereon as promisors. It appears that the bank discounted the note on the credit primarily of its customers, the payees, making no inquiry as to whether it was a corporate or individual obligation, and having no knowledge on the subject. In law it was the individual note of the defendants (Casco National Bank v. Clark, 139 N. Y. 308, 34 N. E. 908, 36 Am. St. Rep. 705; Merchant's National Bank v. Clark, 139 N. Y. 315, 34 N. E. 910, 36 Am. St. Rep. 710), and the form of the promise is quite consistent with an intention to create an individual liability. The fact that the bank sued the Wallis Iron Works on one of the notes of this kind is not a material circumstance. That note matured, and suit was brought thereon, subsequent to the discount of the note now in question. The view there entertained by the plaintiff of the legal nature of the obligation did not conclude the bank from enforcing the note now in question according to its real character. If the fact of the former suit and the pleadings therein were admissible on the question of the knowledge of the bank, when it discounted the present note, that it was issued for and was intended as a corporate obligation, the

[60] Arguments of counsel are omitted.

existence of such knowledge has been negatived by the course of the trial.

We think the judgment is right, and it should, therefore, be affirmed. All concur.

Judgment affirmed.[61]

MEGOWAN et al. v. PETERSON.

(Court of Appeals of New York, 1902. 173 N. Y. 1, 65 N. E. 738.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 7, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial. The nature of the action and the facts, so far as material, are stated in the opinion.[62]

HAIGHT, J. This action was brought to recover of the defendant personally the amount of a promissory note, of which the following is a copy: "$693.19. Brooklyn, Dec. 28, 1899. Three months after date I promise to pay to the order of C. Stevens Co. six hundred and ninety-three 19/100 dollars at Kings County Bank of Bklyn., value received. Due March 28, 1900. Charles G. Peterson, Trustee." The plaintiffs were copartners doing business under the firm name of C. Stevens Company, and upon the trial, to establish their cause of action, introduced the note in question in evidence, the signature being admitted, and then rested.

The defendant, in order to establish his defense, then introduced in evidence testimony tending to show that on the 4th day of December, 1899, the surviving member of the firm of Johnson & Peterson called a meeting of the creditors of the firm, and at such meeting the creditors assembled executed a paper by which "we, the undersigned creditors of Johnson & Peterson, hereby agree to and with each other and for the purpose of liquidating the business of Johnson & Peterson and the completion of the contracts of said firm, do hereby appoint Charles G. Peterson as sole agent and trustee for the benefit of all creditors to assume control and management of said business, here-

[61] Contra: Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811 (1905) semble. See Western Grocery Co. v. Lackman, 75 Kan. 34, 88 Pac. 527 (1907), an action on a promissory note payable to the plaintiff and signed "Kansas City & Olathe Electric Ry. Co., Wm. Lackman, President, D. B. Johnson, Secretary." In holding that the plaintiff could not recover, the court said: "It has been held in this state that, when it is uncertain from the face of the note whether it was intended to be the note of the corporation, or of the individuals signing it, or both, if the litigation arises between the original parties, evidence may be introduced to explain the ambiguity." See, to the same effect, where the note read "we promise," and was signed by "Varick Contracting Co." and "John Martin," Dunbar Co. v. Martin, 53 Misc. Rep. 312, 103 N. Y. Supp. 91 (1907).

[62] The arguments of counsel are omitted.

by ratifying each and every act of said agent in the premises by him done or to be done; and we severally agree to forbear the prosecution and collection of our respective claims against said firm." Then followed the signatures of the creditors, among which is that of the plaintiff's firm, "C. Stevens Co." This was followed by another paper of the same character, upon which appear the signatures of other creditors who were not present at the meeting. Thereupon, and at the same meeting, another paper was drawn and executed by Johnson, the surviving member of the firm, by which, in consideration of $1, the receipt of which he admitted, he bargained and sold, granted and conveyed, unto Charles G. Peterson, as trustee for the creditors of Johnson & Peterson, his successors and assigns, all the stock in trade, goods, merchandise, effects, and property of every description belonging to or owned by the said partnership of Johnson & Peterson, wherever the same may be, together with all debts, choses in action, and sums of money due and owing to said firm. He then produced oral testimony tending to show that he entered upon the discharge of his duties as such trustee, and undertook the completion of certain buildings which Johnson & Peterson had contracted to construct, and for that purpose purchased lumber of these plaintiffs under the express agreement that they would accept in payment therefor his promissory note as such trustee and that the note in suit was given in payment for such lumber. This latter testimony was controverted by the plaintiffs, who testified that they did not know the purpose for which the lumber was purchased, and did not agree with him to accept his note as trustee for the benefit of the creditors in payment therefor.

At the conclusion of the evidence, the court, upon application of the defendant's counsel, dismissed the complaint upon the ground that no cause of action had been established against the defendant, the plaintiffs asking for leave to go to the jury upon the controverted fact as to whether the plaintiffs gave credit to the defendant in his representative capacity or as an individual. An exception was taken by the plaintiffs to the direction of a verdict by the court.

The negotiable instruments law (Laws 1897, c. 612, § 39) provides as follows: "Where the instrument contains, or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." In this case, as we have seen, the defendant signed the note, and then added to his signature the word "trustee." He did not, in the instrument itself, disclose the fact that he was trustee for the creditors of Johnson & Peterson, so that, under the provisions of this statute, he would become personally liable upon the note, unless he could show that at the time of the delivery of the note to the plain-

tiffs he disclosed the fact that the consideration for which the note was given was for the benefit of the creditors of Johnson & Peterson, and that he gave the note as the trustee for such creditors.

It is contended on behalf of the plaintiffs that his representative character must be disclosed upon the face of the note. This may be so in so far as innocent purchasers for value are concerned, but as to the payees named in the note we think a different rule prevails. In the case of First National Bank v. Wallis, 150 N. Y. 455, 44 N. E. 1038, the action was upon a promissory note signed by Wallis, who added to his signature "President," and by Smith, who added to his signature "Treasurer." They were in fact president and treasurer of the Wallis Iron Works, a corporation, and the note was issued as an obligation for the corporation, and was discounted by the plaintiff bank. It was held that the plaintiff was entitled to recover upon the ground that the representative characters of the defendants were not disclosed to the bank at the time that it discounted the paper. Andrews, C. J., in delivering the opinion of the court, said, with reference thereto: "It may be admitted that if the bank, when it discounted the paper, was informed or knew that the note was issued by the corporation, and was intended to create only a corporate liability, it could not be enforced against the defendants as individuals, who, by mistake, had executed it in such form as to make it on its face their own note, and not that of the corporation. But, according to the rules governing commercial paper, nothing short of notice, express or implied, brought home to the bank at the time of the discount, that the note was issued as the note of the corporation, and was not intended to bind the defendants, could defeat its remedy against the parties actually liable thereon as promisors." We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown. Benton v. Martin, 52 N. Y. 570, 574; Bookstaver v. Jayne, 60 N. Y. 146; Juilliard v. Chaffee, 92 N. Y. 529, 534; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Baird v. Baird, 145 N. Y. 659, 664, 40 N. E. 222, 28 L. R. A. 375; Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600, Schmittler v. Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32.

It is further contended on behalf of the plaintiffs that they are now entitled to judgment, for the reason that the answer does not allege all of the facts necessary to constitute a defense. The case, however, was not tried upon that theory, and the plaintiffs did not, upon the trial ask for any direction of a verdict. If the answer of the defendant is defective the question should have been raised in the trial court, where an opportunity to amend might have been given if it was found wanting in any material allegation. The trial court appears to have

been of the opinion that the plaintiffs, by signing the paper selecting the defendant to liquidate the business of Johnson & Peterson, constituted him their agent, and that, therefore, he could not be held personally liable. We think this paper must be read in connection with that executed by Johnson, and, reading the two together, the intent of the parties is made reasonably clear. Johnson, the surviving member of the firm of Johnson & Peterson, called a meeting of the creditors and gave them the privilege of selecting the person who should take charge of the assets of the firm, carry on the business so far as it was necessary to close up existing contracts, and then distribute the property. The creditors selected the defendant, and then Johnson conveyed all the property of the firm to him as trustee for the creditors, thereby vesting the title to the property in him as such trustee. We think, therefore, that, notwithstanding the fact that the word "agent" is used in the paper signed by the creditors, under the latter instrument the defendant became a trustee for the creditors, and that it was in such character that he took possession of the property and undertook the liquidation of the assigned estate.

The evidence submitted on behalf of the defendant, tending to show that the lumber for which the note was given was purchased for the benefit of the assigned estate, and that the plaintiffs agreed to accept his note in his representative capacity therefor, having been controverted by the testimony of the plaintiffs, a question of fact arose which it became necessary for the trial court to submit to the jury. It was, therefore, error to refuse the plaintiffs' request to go to the jury upon this question of fact, and to direct a verdict in favor of the defendant.

The judgment should be reversed, and a new trial granted, with costs to abide the event.[63]

(II) Payee

GORDON v. LANSING STATE SAVINGS BANK.

(Supreme Court of Michigan, 1903. 133 Mich. 143, 94 N. W. 741.)

Assumpsit by Gordon against the bank to recover the balance of a deposit. From a judgment for plaintiff, defendant brings error.

Moore J. This case was tried by the circuit judge without a jury. At the request of the defendant, he made a finding of facts, which is as follows:

"Monday morning, December 9, 1901, at about 9 o'clock, there was presented at the bank of defendant at the city of Lansing for payment

[63] Accord: Kerby v. Ruegamer, 107 App. Div. 491, 95 N. Y. Supp. 408 (1905). Compare Tuttle v. First National Bank, 187 Mass. 533, 535, 73 N. E. 560, 105 Am. St. Rep. 420 (1905).

the following check, made upon the printed form of check supplied by defendant to its patrons, and signed by plaintiff, viz.:

"'Lansing, Mich. 190 No.

"'Lansing State Savings Bank of Lansing.

"'Pay to the order of _____ Nine Hundred and Seventy Dollars—$970.00. Jno. R. Gordon.'

"The check was indorsed by Charles P. Downey, and was presented by an employé of Mr. Downey, and cash was paid at the time of its presentation. The plaintiff had been a depositor at defendant's bank at periods for three or four years, and at the opening of the bank on the morning of December 9, 1901, his balance or credit upon the books of the bank was $3.40, but during the day $2,997.50 was added to plaintiff's credit. The day defendant cashed the check plaintiff was at the bank, and was informed that the check for $970 had been cashed by payment to Mr. Downey, and he then notified defendant he would not accept that check as a voucher for the money paid. December 14, 1901, plaintiff prepared and presented to defendant his check, payable to himself, for $970, being the amount he claimed to then have on deposit in the bank. Payment on this check was refused by defendant upon the ground that plaintiff had no funds in the bank."

The circuit judge rendered a judgment in favor of the plaintiff for $970 and interest. The case is brought here by writ of error.

Two questions are discussed by counsel: First, the effect of not dating the check; second, has the check a payee? We do not deem it necessary to discuss the first question.

As to the second question, it will be noticed the drawer of the check did not name a payee therein, nor did he leave a blank space where the name of a payee might be inserted, nor did he name an impersonal payee. In the case of McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983, the court used the following language: "A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to 'Bills Payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicates an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement—that is, that it shall be payable to bearer.[64] So, when a bill, or note or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a bona fide holder may then recover on it. These cases differ essentially from the one at bar. In the latter case the person to whom delivered is presumed, in favor of a bona fide holder, to have had authority to insert a name as payee. In the former cases the instrument is, when it

[64] Accord: Cleary v. De Beck Co., 54 Misc. Rep. 537, 104 N. Y. Supp. 831 (1907), a check payable to "Cash."

passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee's name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words 'on sight' are such impersonal payee. They were inserted, however, for another purpose—to fix the time of payment, and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but, having left out the payee's name, without inserting in lieu thereof words indicating the bearer as a payee, it is as fatally defective as it would be if the drawee's name were omitted." See, also, Rush et al. v. Haggard, 68 Tex. 674, 5 S. W. 683; Prewitt v. Chapman, 6 Ala. 86; Brown v. Gilman et al., 13 Mass. 160; Rich et al. v. Starbuck, 51 Ind. 87; Norton, Bills & Notes (3d Ed.) p. 59, and notes; 1 Daniel, Neg. Inst. (4th Ed.) § 102.

The case differs from the one at bar in some respects, but the important part of the decision is that a payee is necessary to make a complete instrument, and, even though the maker of the check may have intended to name a payee, if he has not in fact done so the check is incomplete. In the case at bar the failure to name a payee was not an oversight, if we may judge from what Mr. Gordon did, as will appear more in detail later.

Our attention has been called to Crutchly v. Mann, 5 Taunt. 529. In this case the bill of exchange was made payable to the order of ..... The court found that, under the facts shown, the conclusion was irresistible that the name was filled in with the consent of the drawer. The same case was previously reported in 2 Maule & S. 90 (Cruchley v. Clarance), where, as the case then stood, it appeared the bill of exchange had been sent out, the defendant leaving a blank for the name of the payee. One of the judges was of the opinion that the defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill of exchange; another judge was of the opinion that it was as though the defendant had made the bill payable to bearer; while the third judge was of the opinion that the issuing of the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

In the case of Harding v. State, 54 Ind. 359, a promissory note was drawn, leaving a blank space for the name of the payee; and it was held: "So the name of the payee may be left blank, and this will authorize any bona fide holder to insert his own name. 1 Pars. Notes & B. 33." In the case of Brummel v. Enders, 18 Grat. 873, promissory notes blank as to the names of the payees had been put in the hands of an agent to be sold for the benefit of the makers. The agent sold them, at a greater discount than the legal rate of interest, to purchasers who did not know they were sold for the benefit of the makers.

At the time of the sale the names of the purchasers were inserted, either by the purchasers or by the agent, in the blank left for the payee. When the notes were sued the makers pleaded usury. The court, following the cases already cited, held that any bona fide holder of a bill or note which is blank as to the name of the payee may insert his own name and thus acquire all the rights of the payee.

It will be observed that the case at bar differs from all of these cases. As before stated not only did Mr. Gordon fail to insert the name of a payee, or to leave a blank where the name of the payee might be inserted, but he did more. He drew a line through the blank space making it impossible for any one else to insert therein a name, indicating very clearly that he not only declined to name a payee but intended to make it impossible for any one else to do so. Had Mr. Gordon issued a check otherwise perfect, but with the blank space for the amount of the check unfilled, and delivered it to a third person it would be presumed the third person was given authority to fill the blank space. But had he, instead of leaving the space a blank filled it by drawing a line through it, would any one say the third person might then insert a sum of money in that space? If not, upon what principle may the name of a payee be inserted when the space was filled in the same way, or upon what theory may it be presumed there was an impersonal payee when the maker has not made the check payable to cash or some other impersonal payee? In order to construe the check as a complete instrument, we must read into it an intention not only not expressed by its language, but contrary to the act of the maker. The check, as it appears to-day, is without any payee. The record is silent in relation to whom it was delivered, or whether the person who presented it at the bank or the person whose indorsement it bears was a bona fide holder.

Judgment is affirmed.

HOOKER, C. J., concurred with MOORE, J.

CARPENTER, J. I regret that I cannot concur in the opinion of my Brother MOORE. I agree with him that the check in question is not governed by the authorities which hold that, where a blank is left for the insertion of the name of a payee, the instrument is to be treated as payable to bearer. I cannot agree, however, that the case of McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983, is controlling. That case resembles this in many particulars. There is, however, a difference which, in my judgment, renders the reasoning of that case inapplicable. The fact that the plaintiff in the case at bar used the ordinary blank, and drew a line through the space intended for the name of the payee prevents our assuming, as did the court there—and its decision was based on this assumption—that it is "the case of an inadvertent failure to complete the instrument intended by the parties." The instrument under consideration is obviously complete, in just the form the maker intended.

In my judgment, the authorities which hold a check payable to the order of an impersonal payee to be valid and negotiable control this case. I quote from the case of Willets v. Bank, 2 Duer (N. Y.) at page 129: "One of the checks was payable to the order of 1658, the other three to the order of bills payable; and, as the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an indorsement, is, in judgment of law, payable to bearer. Vere v. Lewis, 3 Term R. 183; Minet v. Gibson, Id. 481; Gibson v. Minet, 1 H. Black, 569, affirmed in the House of Lords. And it seems to us quite manifest that in principle these decisions embrace the present case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and, consequently, were payable to bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud."

In Mechanics' Bank v. Straiton, 3 Abb. Dec. (N. Y.) 269, a check payable to bills payable or order was held payable to bearer, the court saying: "By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement—i. e., in the same manner as if it had been made payable to bearer."

We must decide that the check in the case at bar, like those in the cases cited, is either altogether void, or is transferable by delivery. I submit that we should follow those cases, and decide that it is transferable by delivery. To quote the language of Lord Ellenborough, in Cruchley v. Clarance, 2 Maule & S. 90: "As the defendant has chosen to send the bill [check] into the world in this form, the world ought not to be deceived by his acts." This view of the case compels me to notice the fact that the check under consideration is not dated. According to the weight of authority, this omission does not invalidate it. See Zane, Banks, § 152; 2 Daniel, Neg. Inst., § 1577; Norton, Bills & N. (3d Ed.) p. 405, note.

I think the judgment of the court below should be reversed, and a judgment entered in this court for the defendant.

GRANT, J., concurred with CARPENTER, J. MONTGOMERY, J., did not sit.[65]

[65] "$2,500.00. La Crosse, Wisconsin, Sept. 2, '97.
Four months after date, for value received, I promise to pay to the order of twenty-five hundred dollars, at the office of People's Bank, Bloomington,

REGINA v. BARTLETT.

(Nisi Prius, before Erskine, J., 1841. 2 Mood. & R. 362.)

The prisoner was indicted for forging and uttering a bill of exchange, and the acceptance of a bill of exchange. In several of the counts the bill was set out verbatim, and in all it was called a bill of exchange. The document, when produced, agreed with that set out, and was in the following form:

"Nov. 10, 1840.

"Please to pay to your order the sum of forty-seven pounds for value received.

"J. Bishop."

"To Mr. G. Peckford, Yeovil." Accepted G. Peckford.

The paper was indorsed "J. Bishop."

It was objected for the prisoner that this could not be called a bill of exchange; it was nothing more than a request to a man to pay himself, and the acceptance of such a document laid the acceptor under no obligation to a third party.

Illinois, with interest at seven per cent. per annum until paid. And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such an amount as may be due and also for such an amount as may become due thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, or in execution thereon, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof.

"John Willing."

The note was upon a printed form which, after the words "pay to the order of," contained a single blank line terminating in the word "dollars"; the words "twenty-five hundred" being written at the extreme left of that line, so as to leave no space whatever in front of them for the name of a payee. The plaintiff's attorney, before taking judgment in Illinois, had interlined between the words "pay to the order of" and the words "twenty-five hundred" the name of Edward E. Smith. Referring to the above instrument, Dodge, J., said:

"Plaintiff's principal contention is that this is a negotiable promissory note on either of two theories: First, that, by reason of the provision in the power of attorney embodied in the note that judgment may be confessed in favor of the holder, the silence of the promissory part of the note itself as to a payee is supplied, and the note becomes, by its terms, a note payable to bearer; secondly, that omission of the name of the payee is, in practical effect, the leaving of a blank which any person having possession of the note is thereby impliedly authorized to fill up; the further contention being that, if this is a negotiable promissory note, the defendant has no meritorious defense based upon the agreement, at the time it was given, that it should be used only for a special purpose, since the very purpose of the law merchant is to give such currency and certainty to negotiable paper that equities existing only between the original parties cannot affect subsequent bona fide holders for value. Young v. Ward, 21 Ill. 226.

"The first ground on which plaintiff asserts negotiability we deem untenable. The part of the entire writing which seeks to express the promise made clearly shows an intent that it be payable only to some person or

ERSKINE, J., said he should reserve the point for the consideration of the judges, and left the case to the jury, who convicted the prisoner; and he was sentenced to transportation.

His Lordship, however, afterwards thought the objection so clearly valid that he did not submit the case to the judges, but recommended a pardon for the offense.

WITTE v. WILLIAMS.

(Supreme Court of South Carolina. 1876. 8 S. C. 290, 28 Am. Rep. 294.)

This was an action by Chas. O. Witte against Mrs. Sally C. Williams. The complaint alleged: That on the 15th day of December, 1868, the defendant, at Charleston aforesaid, made her other bill of exchange in writing and directed the same to J. & J. D. Kirkpatrick, at Charleston aforesaid, and thereby required the said J. & J. D. Kirkpatrick to pay to the order of the said J. & J. D. Kirkpatrick the sum of $2,500 three hundred and sixty-five days after the date thereof, which period elapsed before this suit was brought, and then and there delivered the said bill to the said J. & J. D. Kirkpatrick, who

that person's order, and thus negatives intent to make it payable to whoever may happen to acquire possession, without indorsement from the original payee. The two conceptions are antagonistic. We cannot think the mere authority to confess judgment in favor of the holder sufficient to overcome that clear declaration in the promissory portion. That would be an entirely proper and enforceable provision, if some person had been in fact named as payee. It surely would not then suffice to transform the note into one payable by its terms to bearer. Nat. Exch. Bank v. Wiley, 25 Sup. Ct. 70. We cannot avoid the conclusion that the paper on its face shows that a payee was intended to be named, but by mistake was not named. That this was the intent is confirmed by the evidence, which shows clearly that both parties to the making of the instrument intended to make it payable to the order of the People's Bank of Bloomington, and supposed they had done so. A promise to pay, other than to bearer, which is not certain as to the payee, is not negotiable, with certain well-defined conventional exceptions not at all applicable here. * * *

"The next contention rests upon a perfectly well-established rule, that the delivery of a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of any one to whom it may come. This rule is based on implied agreement with any one who may become the owner, and is not to be confused in principle or application with those cases, some of which are cited above, where an incomplete instrument is delivered to one, not as payee, but as agent, with authority to make it complete, and where the agent exceeds his authority; for the insertion of plaintiff's name in this paper was not made by defendant's agent, but by plaintiff himself, under his claimed rights as owner. This implied authority depends, however, on the very existence of a blank. There is no right in the holder of a contract, negotiable or otherwise, to rewrite it or insert omitted provisions, except where the signer, by leaving a blank, obviously delivers it with such intention. In the instrument before us there was no blank; the writing joined to the printed portion without physical break or separation. True, there was an hiatus in sense, but that does not carry with it any authority to supply the missing term.

"We must therefore reach the conclusion that this instrument is not negotiable." Smith v. Willing, 123 Wis. 377, 101 N. W. 692, 68 L. R. A. 940 (1904).

indorsed the same and delivered it to the plaintiff; and the said plaintiff further says that the said bill was duly presented to the said J. & J. D. Kirkpatrick for acceptance and that the said firm duly accepted the same, and at maturity that said bill was duly presented for payment but was not paid, of all which the defendant had notice. And the plaintiff further says that he is now the lawful owner and holder of the said bill, and the defendant is justly indebted to him therefor in the sum of $2,500, principal, together with interest thereon from the eighteenth day of December, 1869, and $2.35 costs of protest.

The defense was on the ground, inter alia, that the instrument set forth in the complaint was not a bill of exchange because the name of the drawer and payee designated the same person, and that the defendant therefore was not liable as drawer of a bill. Judgment for defendant. Plaintiff appealed.[66]

Moses, C. J. * * * The instrument was held not a bill of exchange because drawn on J. & J. D. Kirkpatrick, requesting the drawees to pay to their own order a certain sum of money, while a bill of exchange presupposes a duty on them to pay to some other than themselves. The only authority relied on in support of the position is found in Story on Bills, § 35. With the accustomed deference that is due to so distinguished a jurist as the late Mr. Justice Story, we are obliged to say that the proposition is not sustainable on either principle or authority. We are the more emboldened to say so because, in the same section, the learned writer thus expresses himself: "Nay, the drawer may at once become drawer, payee and drawee; as, for example, if he should draw a bill on himself, payable to his own order at a particular place, naming no drawee, and then should indorse it over, the indorsee might sue him as acceptor of the bill or as maker of a promissory note, at his election." And in section 36 he says: "The drawee and the payee may be also one and the same person." But in Wildes v. Savage, 1 Story, 29, Fed. Cas. No. 17,653, he lays down the rule in direct contradiction to his affirmation cited by the presiding judge to sustain his own conclusion. We quote the very words of Justice Story: "The argument is that the bill is not a regular bill of exchange because it is drawn by Russel & Co., payable to Wildes & Co., who are the drawees of the bill. * * * An instrument is not the less of a bill of exchange because all the parties to it in the character of drawers, payees and drawees are not different persons. A bill drawn by a person payable to his own order has always been deemed to be a bill of exchange in the commercial sense of the phrase, and it would not cease to be such a bill if it should be indorsed by the drawer payable to the drawee. Now, such a bill so indorsed differs in nothing substantially from the present bill. In truth, where the bill is negotiable, and contains a drawer, a payee and

[66] The statement is abridged, arguments are omitted, and a part only of the opinion is printed.

a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties shall fill a double character."

Mr. Chitty, in his work on Bills (page 25), says: "It is not, however, necessary that there should be three parties to a bill. There are sometimes only two, as where a person draws on another payable to his own order; and, indeed, a bill will be valid where there is only one party to it, for a man may draw on himself payable to his own order. In such cases, however, the instrument may be treated as, in legal operation, a promissory note, and declared on accordingly, but in practice it is usual to declare upon the instrument as if it were a bill not admitting the identity of drawer and drawee." * * *

Judgment reversed.

HOOPER v. WILLIAMS.

(Court of Exchequer, 1848. 2 Exch. 13.)

The declaration stated that the defendant, on the 12th of November, A. D. 1846, made his promissory note in writing, and thereby promised to pay to the bearer thereof £150, for value received, two months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then delivered the said note to one J. Kent, who thereby became the bearer thereof, and who indorsed and delivered it to the plaintiff, who thereby became the bearer thereof; whereof the defendant then had notice, and then, in consideration of the premises, promised to pay the amount of the note to the plaintiff according to the tenor and effect thereof. Breach, nonpayment.

The defendant pleaded that he did not make the note.

At the trial, before Lord Denman, C. J., at the Surrey spring assizes, 1847, the plaintiff gave in evidence the following note:

"Camberwell, Nov. 12, 1846.

"Two months after date, I promise to pay to my own order £150, value received. James Williams."

The note, which bore a 4s. 6d. stamp, was indorsed in blank by the defendant, and afterwards by J. Kent. It was objected, on the part of the defendant, that the instrument given in evidence was not a promissory note within St. 3 & 4 Anne, c. 9, and that it did not support the declaration; also, that it should have been stamped as an agreement; or if the indorsement by the defendant were treated as a new contract, then a new stamp would be requisite. The learned judge directed a nonsuit, reserving leave for the plaintiff to move to enter a verdict for him for the amount of the note.

Channell, Serjt., in last Easter Term, obtained a rule nisi accordingly.[37]

[37] The arguments of counsel are omitted.

PARKE, B. In this case, we think the rule to enter a verdict for the plaintiff should be made absolute. The plaintiff declared on a note for £150 at two months, made by the defendant, and payable to bearer, which the defendant delivered to one J. K. Kent, and Kent indorsed to the plaintiff. The defendant pleaded that he did not make the note. On the trial, the plaintiff produced a note corresponding in date, made by the defendant, whereby he promised to pay to his own order £150, two months after date. The note was indorsed in blank by the defendant, and afterwards by J. K. Kent. My Brother Channell objected to the receipt of the note in evidence, on the ground of variance, and that it was not a note within St. 3 & 4 Anne, c. 9, and not obligatory as a note; and if so, that it required a stamp as an agreement, or that the indorsement by Kent made it a new note, so that it required a new note stamp. Lord Denman allowed the objections, reserving the points. On showing cause the principal question was, what the effect of this instrument was as it stood originally before it was indorsed, and whether it was, within St. 3 & 4 Anne, c. 9, a good and valid note, payable to the order of the maker. The opinion of this court and that of the Queen's Bench, as to this point, are at variance with one another. In Flight v. Maclean, this court held, on special demurrer to the first count of a declaration stating a note payable to the order of the maker, and indorsed to the plaintiff, that the count was bad, such a note not being within the statute of Anne. The case of Wood v. Mytton afterwards came on in the Queen's Bench. It was an action on a similar note indorsed to the plaintiff. After verdict for the plaintiff, a motion was made in arrest of judgment; and the court discharged the rule, holding, after a minute examination of all the provisions of the statute of Anne, that such a note was within that statute, and assignable by indorsement. Though these decisions are not at variance, as will be afterwards explained, the construction of the statute by the two courts differs.

After a careful perusal of the statute, we must say that we do not think that it ever contemplated the case of notes payable to the maker's order, which are incomplete instruments, and have no binding effect on any one till indorsed. The Court of Queen's Bench thought that, though the first part of the first section of the statute of Anne applied only to notes payable to another person, or his order, or to bearer, which notes it makes obligatory between the parties, yet that the second part applies to every note payable to any person, and therefore includes a note payable to the maker or his order. It appears to us that this is not the meaning of this part of the section, which is, as we think, intended to make those instruments, to which it had previously given an obligatory effect between the original parties, transferable to third persons, so as to enable them to sue upon them as upon the transfer of bills of exchange. The previous part of the section had given to the payee, when the note was made payable to another person, or to another person or order, and to the bearer, whoever at

any time he might be, a right to sue, thus providing entirely for notes payable to bearer, whether in the hands of the original or a subsequent bearer. And then the section proceeds to make the class of notes payable to a person or order transferable. We think that the Legislature, by the second part of the section, could only mean to make that instrument, which gave a right to sue, assignable; and no right to sue could exist in any one, in the case of a note payable to the maker's order, until the order was made in the shape of an indorsement; until that indorsement was made, it was an imperfect instrument, and, in truth, not a promissory note at all, and consequently not transferable under the statute. What, then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and the indorsee, and then, and not till then, it became an assignable note.

It is well settled, that no particular form of words is necessary to constitute a promissory note. If a man draws an instrument in the form of a bill of exchange on himself, and accepts it, it is a promissory note. If he says, "I pay to A. B. £100," and adds an address to the instrument, it may be declared on as a note. What, then, is the meaning of the instrument in question? Before the indorsement, it may be considered to be a promise to pay £150, two months after date, to the person to whom the maker should afterwards, by indorsement, order the amount to be paid, such indorsement being intended to have the same operation as if put on a complete note. If, then, the indorsement should be to a particular person, or to A. B. or his order, it would be a note payable to that person, or to A. B. or his order; and if in blank, it would be payable to bearer, in like manner as a sum secured by a complete note would have been by similar indorsements. It may follow as a consequence, that the holder might fill up the blank indorsement by writing over it his own name, and so make it payable to himself, although it is not necessary to determine that point; and, reading the note as payable to bearer, any one may afterwards indorse his own name, and so make himself liable to subsequent holders, as the indorser of a complete note payable to bearer would do. Story on Notes, § 132.

It appears to us, then, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration.

This view of the case reconciles the decision of this court in Flight v. Maclean with that of the Queen's Bench in Wood v. Mytton; but not the reasons given for those decisions. In the case in this court, the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was, in substance,

good; for it set out an inartificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff.

The difference between the two courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd, form, are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne, and for what good reason no one can tell, has become of late years exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them.

The objection to the stamp, in our view of the case, cannot prevail, as the note was a valid note at two months, payable to bearer as soon as the indorsement was put upon it; and our judgment is, that the rule be made absolute.

Rule absolute.[68]

BLANCKENHAGEN v. BLUNDELL.

(Court of King's Bench, 1819. 2 Barn. & Ald. 417.)

Declaration alleged that the defendant, on the 24th May, 1817, made a promissory note, and delivered the note to the plaintiffs; by which note defendant promised to pay to J. P. Damer, then of Rio de Janiero, or to the plaintiffs, or to his or their order, 250 sterling, in Portuguese currency, at the rate of 57d. sterling per mil-ré, together with interest from the 27th July, one-half at 14, and one-half at 26 months, from the date, value received; whereby, and by force of the statute, the defendant became liable to pay, etc., and being liable, promised, etc. The declaration then stated that the money mentioned in the note became due according to the tenor and effect thereof, yet that the defendant, athough often requested, had not paid the same to the plaintiffs, nor had he paid the same to Damer. The second count was upon the same promissory note; but only alleged a general liability to pay, without treating it as a promissory note within the statute of Anne. Demurrer.[69]

Abbott, C. J. I have no doubt that this instrument, in the form in which it is declared on, is not a promissory note within the statute of Anne; for if a note is made payable to one or other of two persons, it is payable to either of them, only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute. I am also of opinion, that the second count cannot be supported. * * *

[68] See Chamberlain v. Young, [1893] 2 Q. B. 206.

[69] Parts of the opinions relating to second count are omitted.

BAYLEY, J. I am of the same opinion. If there had been any community of interest stated between the payees so as in any respect to identify Damer and Blanckenhagen, it is possible that an action might have been maintained on this note; but in the way in which the declaration has been framed, stating this as a note payable to one or the other, I am very clearly of opinion that it is not that description of note which the statute of Anne contemplated.

HOLROYD, J. I am of the same opinion, that this note does not come within the description of notes contemplated by the statute of Anne. It is, in fact, a promise to pay to A., if the maker does not pay to B. and C. It is therefore a conditional promise, and consequently not within the statute. And I am also of opinion that the second count cannot be supported. * * *

Judgment for defendant.[70]

STORM v. STIRLING.

(Court of Queen's Bench, 1854. 3 Ellis & B. 832.)

Declaration upon a promissory note.

On the trial, before Crompton, J., at the Middlesex sittings in Michaelmas term, 1853, a special verdict was found, of which the parts now material were as follows:

As to the first issue: That the defendant, at a certain place, etc. (as in the declaration), made and signed, and delivered to the plaintiff, a document in the words and figures following, that is to say:

"C. 20,000. Calcutta, 10th March, 1845.

"Nine months after date, I promise to pay to the secretary for the time being of the Indian Laudable & Mutual Assurance Society, or order, company's rupees, twenty thousand, with interest at the rate of six per cent. per annum. And I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot, by way of pledge or security for the due payment of the said sum of company's rupees, twenty thousand, as aforesaid; and, in default thereof, hereby authorize the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him; and out of the proceeds of sale to reimburse himself the said loan of company's rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale, to make up the full

[70] See Watson v. Evans, 1 Hurlstone & C. 662 (1863), a note payable to "A., B., and C., or to their order, or the major part of them"; Absolon v. Marks, 11 Q. B. 19 (1847), a note signed by five payable "to our and each of our order."

amount of the said loan of company's rupees, twenty thousand, and interest as aforesaid. Edwd. Stirling."

(Then followed the numbers of the shares.)

"No. 33, Due 10/13 Dec./45."

That the Indian Laudable & Mutual Assurance Society, in the said document mentioned, is the Indian Laudable & Mutual Assurance Society within in the declaration mentioned; and that the plaintiff, at the time of the making of the said document, and from thence until the time of the commencement of the within mentioned action, was the secretary of the said society. That the name Edward Stirling, set and subscribed to the said document, is of the proper handwriting of the defendant. That the said sum of twenty thousand company's rupees, at the time of the making of the said document, and when the same became due, was of the value of £2000. of lawful money of Great Britain. The special verdict then left the first issue to the court in the usual form. The findings on the other issues were immaterial to the question now decided.[71]

Lord CAMPBELL, C. J. The nature and every definition which we find in the books of a promissory note show that it must contain an express promise to pay to a person therein, named or designated, or to his order or to bearer. See Byles on Bills (6th Ed.) p. 4; Colehan v. Cooke, Willes, 396; 2 Bl. Com. 467. If the person to whom, or to whose order, it is to be paid is uncertain, and it depends on a contingency to whom, or to whose order, payment is to be made, it is not a promissory note unless it can be treated as payable to bearer.

It was urged, on behalf of the plaintiff, that we might treat this as a note made payable to the plaintiff, who at the date of the document was the secretary of the society, by his description as such secretary. And it was said that the subsequent part of the instrument, in which it is said that the plaintiff deposits in his hands, and that he authorizes the said secretary for the time being forthwith to sell, points to the then secretary as the person to whom alone the promise is made, and to whom alone the note is payable.

There is no doubt, upon the authorities, that it is quite sufficient to make a note by a description or designatio personæ of this kind; but we do not think that we can put the above construction on the document now before us. The use of the words "for the time being" in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument, satisfy us that the payment was to be made to the individual who, at the time of the instrument falling due, should fill the situation of secretary of the company, and not to the plaintiff, unless he happened to be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the docu-

[71] The statement is abridged, and the arguments of counsel and part of the opinion are omitted.

ment became due. The other construction would in effect be to hold that the words "the secretary for the time being" meant the now secretary; but we think that the words were used for the very purpose of excluding that construction.

The case of Rex v. Box, 6 Taunt. 325, which was relied on by the plaintiff, is clearly distinguishable from the present. There the note was payable on demand to A. B. and C. D., by name, "stewardesses" of a provident society, "or their successors in office." There the parties to whom the note was given were designated by name, and the description of them as stewardesses, which it was said they were not legally, being mere matter of description, did not alter the promise to pay them on demand; and the judges said that, although they could have no legal successors as stewardesses, still their executors or administrators might sue. In the present case, as we read the document, the money was never to become payable to the plaintiff, and he was never to have any right upon the instrument, unless he happened to fill the situation of secretary to the society at the end of the nine months. In Rex v. Box, the note, as construed by the court, gave an immediate right of action to the payees named, on which they might have immediately sued; and the court seems to have thought that the mention of the successors, who could have no legal existence, might be rejected so that it did not destroy the immediate legal right expressly given to the plaintiffs on demand. Here there is no right given to the plaintiff, except by the words promising to pay "the secretary for the time being." It was not suggested, in that case, that the note would be good if it amounted to such a floating contingent promise as we think that the words are intended to import in the case before us.

It was suggested also, in the argument, that, if there were no payee who could sue, the note might be treated as payable to bearer. But we think that in so holding we should give a meaning to the note contrary to the clearly expressed intention of the maker. This is not a case of fraud, or of a fictitious payee; but the defect is, that it is a promise to pay some person to be ascertained ex post facto and we know no authority to show that under such circumstances we can hold this instrument to be a note payable to bearer, because, though valid perhaps as an agreement, it cannot be enforced as a promissory note. The promise is to pay to, or to the order of, an uncertain person. But, if founded on good consideration, it may probably give rights legal or equitable to the society. But we think that we should be making a new instrument if we were to hold it a promissory note payable to bearer; and the case does not fall within any of the decisions cited on this branch of the argument.

As we think, therefore, that this is not a promissory note, our judgment is for the defendant.

Judgment for defendant.[72]

[72] Affirmed in the Exchequer Chamber sub nom. Cowie v. Sterling, 6 Ellis & B. 333 (1856). Accord: Yates v. Nash, 8 C. B. (N. S.) 581 (1860).

HOLMES v. JAQUES.

(Court of Queen's Bench, 1866. L. R. 1 Q. B. Cas. 376.)

Declaration by the plaintiffs as payees of a promissory note against the defendant as maker. Plea, traverse of the making.

At the trial, before Shee, J., at the last spring assizes at Leeds, it appeared that the defendant, in 1861, signed the following instrument:

"Harrogate, March 18, 1861.

"On demand I promise to pay to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being, the sum of £100., in four equal installments of £25. each, each of such installments to be due and payable on the 1st Oct. annually, for value received."

The plaintiffs and four other persons were the original trustees of the chapel, the plaintiffs being the survivors. A verdict was returned for the plaintiffs for the amount claimed, with leave to move to enter a verdict for the defendant, if the court should be of opinion that the instrument was invalid as a promissory note.

Manisty, Q. C., moved accordingly. The instrument sued upon is not a valid promissory note, owing to the uncertainty of the payees. It is payable to the trustees or their treasurer for the time being; if this be taken to mean the trustees for the time being, or their treasurer for the time being, then it is uncertain as to both, and is bad as a promissory note. Cowie v. Stirling, 6 E. & B. 333, 25 L. J. (Q. B.) 335; Yates v. Nash, 8 C. B. (N. S.) 581, 29 L. J. (C. P.) 306. But the principal objection to the instrument is that it is payable to the trustees or the treasurer in the alternative, and Blanckenhagen v. Blundell, 2 B. & A. 417, is a direct authority that this uncertainty renders the instrument no promissory note.

[Blackburn, J. For all that appeared in that case the persons named in the alternative as payees were strangers in interest. And Bayley, J., suggests that, had there appeared a community of interest, then (as appears here) an action might possibly have been maintained.

[Lush, J. You admit that a note payable to "trustees" is sufficient without naming them?]

Yes. That cannot be maintained as an objection. See Megginson v. Harper, 2 C. & M. 322, 4 Tyr. 94, and the judgment in Storm v. Stirling, 3 E. & B., at page 842, 23 L. J. (Q. B.), at page 301.

Cockburn, C. J. I am of opinion that there should be no rule. I fully concur in what Mr. Manisty has said, that the payee must be a person certain, and a promise to pay A. or B., apparent strangers, in the alternative, would not be a good promissory note; but all this instrument shows is that it is payable in the first instance to the trustees as payees, but with the option of the maker to pay to the treasurer for the time being, as their agent.

The treasurer would have no authority to sue in his own name, but only to receive the money on behalf of the trustees. I think it would

be to introduce unnecessary strictness if we were to say that this was not a valid promissory note; and by holding that the treasurer for the time being is simply inserted as an indication that he, as the agent of the trustees, is authorized to receive payment on their behalf, no uncertainty is introduced into the instrument.

BLACKBURN, J. I am quite of the same opinion. I think the true construction of this instrument is that it merely means, I promise to pay to the trustees, or their agents for the time being (the latter being what is implied by law), and I give notice that the treasurer is such agent. This is carrying out the intimation of Bayley, J., in Blanckenhagen v. Blundell, 2 B. & A., at pages 419, 420, that if there had been any community of interest stated between the payees so as in any respect to identify the one with the other, it is possible that an action might have been maintained on the note. I quite agree with Mr. Manisty's argument thus far, if I thought the treasurer was named as payee, so as to be able to indorse the note had it been payable to order, or to sue upon it, there would have been an uncertainty which would have vitiated it as a promissory note; but this is not the construction which ought to be put on the instrument.

SHEE, J. I agree that the treasurer must be taken to be named as agent.

LUSH, J. In two of the cases cited no person was named except the officer for the time being, consequently, of necessity, the officer for the time must have been taken to be meant as the payee; and, therefore, as there was no certain person named as payee, the instrument was invalid as a promissory note or bill of exchange. Here the trustees are designated as payees, and the promise is to pay them by their agent for the time being.

Rule refused.[73]

PATTON v. MELVILLE.

(Court of Queen's Bench of Upper Canada, 1861. 21 U. C. Q. B. 263.)

This was an action brought by Isabella Patton, administratrix with the will annexed of the last will and testament of John Patton, deceased, against Thomas Melville, the defendant, to recover from him the amount of three promissory notes, specially declared upon, made by the defendant, payable to the said John Patton in his lifetime, which were respectively in the following form, excepting that one of them was payable at 12, a second at 18, and the third at 24 months.

"Prescott, August 4, 1858.

"$15. Twelve months after date, for value received, I promise to pay to John Patton, Esquire, treasurer of the building committee of the congregation of St. John's Church, in the town of Prescott, or his

[73] Compare Noxon v. Smith, 127 Mass. 485 (1879).

successor duly appointed, the sum of fifteen dollars, towards the building of a new church in the said town. Thomas Melville."

The defendant denied the making of the said notes, upon which issue was joined. The cause was entered for trial at Brockville, before McLean, J., when a verdict was rendered for the plaintiff, for the sum of £12. 7s. 6d., subject to the opinion of the court on the following case:

The payee of the note was the treasurer of the building committee of the congregation of St. John's Church, in the town of Prescott; and the defendant was a subscriber and contributor towards the building, and for such subscription and contribution made and delivered the promissory notes which are the subject of this action. This action is in fact brought by and for the benefit of the said building committee, and the now treasurer of the same. The name of the present plaintiff is used for the mere purpose of enforcing payment for the said committee or treasurer, and not for her own benefit; and it is agreed that the nisi prius record may be referred to and taken as part of this case.

The defendant contends: (1) That the action cannot be maintained, because the notes show they were given to the payee in a particular character, as treasurer of the said building committee, and he had no interest therein except as such treasurer. (2) That the present plaintiff as the administratrix of the payee can have no interest in the notes, which are payable to the successor of the payee as such treasurer, after the payee's death. (3) That the instruments declared on are not promissory notes, as they are not payable to any one person in particular, or to a person who can be recognized as having any legal existence, and because they are otherwise too uncertainly expressed.

The plaintiff insists they are promissory notes, payable to John Patton in his lifetime, and to his personal representative, the plaintiff, after his death, and that she is entitled to maintain this action for the benefit of the said committee or of the treasurer thereof.

The questions for the opinion of the court are: (1) Whether the plaintiff can maintain an action as administratrix as aforesaid of the said John Patton? and (2) Whether the said instruments are promissory notes? and if the court is of opinion that the plaintiff can maintain this action as aforesaid, and that the said instruments declared on are promissory notes, then the verdict is to be entered for the plaintiff, for the sum aforesaid; but if the court is of opinion, either that the plaintiff cannot maintain this action as aforesaid, or that the said instruments are not promissory notes, then a nonsuit is to be entered.

Robinson, C. J., delivered the judgment of the court.

The plaintiff is entitled in our opinion to sue upon these notes as administratrix of the deceased payee, on the authority of Rex v. Box, 6 Taunt. 329. We can see no distinction between that case and the present. We mean no distinction as respects the legal character of the instrument declared upon.

The payee is named in the note, which distinguishes the present case from Cowie v. Stirling, 3 E. & B. 832. He could have no successor, legally speaking, as treasurer of a church building committee, which had no corporate capacity, and was a mere voluntary association; and the consequence is that on his death, even if none of the notes matured in his lifetime, his personal representative must have a right to sue; and the money when recovered will be held by the plaintiff upon the trust which the note indicates, just as the payee himself would have held it.

Postea to the plaintiff.[74]

FISHER v. ELLIS.

(Supreme Judicial Court of Massachusetts, 1825. 3 Pick. 322.)

Assumpsit, brought by the treasurer of the Third parish in Dedham, upon the following promissory note signed by Oliver Ellis, the defendant's testator, viz.: "Dedham, June 1, 1811. Borrowed and received of Willard Gay, Esquire, treasurer of the Third parish in Dedham, seventy-five dollars, which sum I promise to repay him or his successor in said office, according to the conditions of a donation made to said parish, and accepted by them by a vote passed May 30, 1811, and recorded in the parish book of records, reference thereto being had, with interest on the 1st day of March annually."

The defendant objected to the admission of the note in evidence because the plaintiff had no legal interest in it, and was not a party to it. But Williams, J., overruled the objection and ruled that the parish might sustain the action in the name of their present treasurer, and directed a verdict for the plaintiff. Whereupon the defendant filed his exceptions.[75]

PARKER, C. J. We are not able to perceive any sufficient reason against the plaintiff's recovering in the present action. The promise is made to the Third parish in Dedham, through their treasurer, and it is expressly made to the successors in that office. The parish is a legally existing body, having a right to hold funds, and to be a debtor or creditor. The present plaintiff is the lawful successor of him to whom the promise was immediately made. There is then no objection to the character or capacity of the plaintiff. A promise made to A., for the benefit of B., may be sued by A. or B. Com. Dig. Action, etc., upon Assumpsit, E. * * *

Judgment affirmed.[76]

[74] Accord: Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387 (1851); Whitcomb v. Smart, 38 Me. 264 (1854).

[75] The statement is abridged, and the arguments of counsel and part of the opinion omitted.

[76] Accord: Tainter v. Winter, 53 Me. 348 (1865); McDonald v. Laughlin, 74 Me. 480 (1883); Rogers v. Gibson, 15 Ind. 218 (1860), semble; Buck

MOODY v. THRELKELD.

(Supreme Court of Georgia, 1853. 13 Ga. 55.)

This was an action of debt, brought by John L. Moody, as administrator on the estate of John H. Newland, deceased, against the defendant in error, on the following note:

"On or before the first day of January, eighteen hundred and forty-two, we or either of us promise to pay to administrators of estate of John H. Newland, eleven hundred and twenty dollars and eighty-five cents, for value received. August 22, 1840. T. J. Threlkeld.

"George W. Sims."

The action was commenced on the 22d day of January, 1851. The defendant, among other pleas, filed that of the statute of limitations.

The defendant moved for a nonsuit on the following grounds: (1) Because the paper sued on is not a note on which an action will lie, being too uncertain as to the payee. (2) Because the case is barred by the statute of limitations, and the facts proven do not take it out of the bar of the statute. The court sustained the motion, and awarded a nonsuit, and counsel for plaintiff excepted, and also moved the court to reinstate the case, and allow him to amend his declaration, which motion the court refused, and counsel for plaintiff excepted, and upon these exceptions has assigned error.[77]

LUMPKIN, J. (delivering the opinion). Was the paper sued on a promissory note? We think so, most clearly. We recognize the general principle that it is essential to the validity of a promissory note that it should be certain as to the person to whom it is payable (Story on Pro. Not. 33, note 3), and that parol proof is inadmissible to supply a defect in this respect (Id. § 35). But this does not mean that the person to whom the note is payable should be made known by name, on the face of the note itself.

It is admitted that a note payable to bearer merely, without mentioning any name, is a valid note, and that a note issued with a blank, for the payee's name, may be filled up by any bona fide holder, with his own name as payee, and that then it will be treated as a good promissory note, to him, from its date. And it is upon the familiar maxim, "Id cestum est quod cestum reddi potest." And it is upon the same principle that a note payable to the administrator of an estate has always been held by the courts of Georgia a good promissory note. A reference to the records of the court of ordinary will show with unerring certainty to whom its obligations apply.

Suppose this note had been made payable to John H. Newland in his lifetime. The face of the paper would not disclose who was the legal representative of the payee, to whom alone payment was to be

v. Merrick, 8 Allen (Mass.) 123 (1864), semble. Compare Soares v. Glyn, 8 Q. B. 24 (1845).

[77] The statement is abridged, and part of the opinion omitted.

made, and who alone had the right to transfer it. In that case, as in this, recourse would have to be had to the records of the ordinary. Indeed, there would be greater uncertainty in that case than this, for it would be doubtful whether the representative were executor or administrator; whereas this paper shows upon its face the character of the trustee, namely, that he is administrator. Or, take another illustration: Suppose, as is frequently the case, that the notes of an estate are distributed among the heirs, would not the division constitute such a link in the title of the holder as to enable him to sue for and recover the note? And yet greater uncertainty would exist in that case, also, as to the ownership of the paper, or the person to whom it was payable, than in the present.

Is the statute of limitations a bar to this recovery? It is contended in behalf of the defendant in error that Hill, the administrator of Newland, might have sued on this note, in his individual character, at its maturity. Indeed, the assumption in the argument is that he must have sued in his own right, and that he could not have maintained the action in his trust character, and that no obstacle has occurred to the prosecution of his suit, and that, failing to do so, the remedy is tolled or taken away.

But we apprehend the very reverse of this proposition to be true. Had the note been payable to Hill, with the usual addition of administrator, etc., he might have treated the note as his private property, and declared on it, as such. But even then, on the other hand, he would not be bound to have done this, but might also have sued in his representative capacity, and the defendant would have been estopped from denying the fact that he was administrator.[78] And conceding that a proper mode of declaring on this note would have been to have averred that it was made payable to Jacob R. Hill, by the name and style of administrator on the estate of John H. Newland,[79] still it cannot be questioned for a moment that the note may be treated as the property of Newland's estate, and sued on, as it has been, as such.[80] And if this be true, it is an effectual reply to the plea of the statute. But this note is payable to the administrator of the estate of Newland. The legal title vests in him, as trustee, and it is doubtful whether the suit

[78] Accord: Williams on Executors, marg. p. 763.

[79] On a note similar to that in the principal case, a declaration in the form suggested, without an allegation that the plaintiffs were administrators when the action was begun, was held good on demurrer. Adams v. King, 16 Ill. 169, 61 Am. Dec. 64 (1854). But, of course, on the trial the plaintiffs must prove that they answered the description in the note; i. e. that they were administrators when the note was delivered. Hamilton v. Aston, 1 Car. & K. 679 (1845).

[80] Accord: Barron v. Vandvert, 13 Ala. 232 (1848), where the action was by the administrator de bonis on a note payable to his predecessor, "F. B., administrator of W. B."; Dunham v. Grant, 12 Ala. 105 (1847), where after his removal from office G. was not allowed to recover on a note payable to "G., administrator of M. M.," although no successor had been appointed; Williams on Executors, marg. p. 764. Compare Atherwood v. Chabaud, 1 B. & C. 150 (1823).

could be brought by him in any other right.[81] In this character, at any rate, he did sue within six years from the time the cause of action accrued. The case remained on the docket till August, 1850, when it was nonsuited. It was recommenced by his successor, in January, 1851, within less than six months from the time when the first suit was dismissed. No plea to the disability of the plaintiff to maintain either the first or second suit, in his representative character, has ever been filed. Consequently the statute has not interfered to save the defendant. * * *

Judgment reversed.[82]

GRIST et al. v. BACKHOUSE.

(Supreme Court of North Carolina, 1839. 20 N. C. 496.)

This was an action of debt, on a negotiable single bill, in which the plaintiffs declared as assignees of Richard Grist. Plea—the general issue.

On the trial at Craven, on the last circuit, before his honor Judge Settle, the plaintiffs proved and read in evidence the bill upon which they declared, in the following words and figures, to wit:

"$233. Ninety days after date we jointly and severally promise to pay Richard Grist, agent of his assignees, or order, two hundred and thirty-three dollars, value received. Negotiable and payable at the Bank of New Berne. Witness our hands and seals July 23d, 1833.

"Allen Backhouse. [Seal.]
"Wm. V. Barrow. [Seal.]"

The plaintiffs then produced and read a deed of assignment to themselves of all the effects of Richard Grist, for the benefit of his creditors, which was executed before the date of the bill. There was no indorsement of the bill by the payee. Upon this evidence the jury, under the instruction of his honor, returned a verdict for the plaintiffs, whereupon they had judgment, and the defendant appealed.

DANIEL, J., after stating the facts as above, proceeded as follows: We are of the opinion that the evidence offered by the plaintiffs did not support their declaration, and that the judge misdirected the jury as to the law, when he told them that the plaintiffs were entitled to recover. Where a bill was made payable to A., to the use of B., it was held that B. had but an equitable right, not a legal interest, and that he could not maintain an action on the bill against the acceptor. Evans v. Cramlington, Carth. 5, 1 Leigh's N. P. 402; Byles on Bills,

[81] That Hill might have treated the phrase "administrator of estate of J. H. U." as descriptio personæ is held in Adams v. King, supra. See, also, Hamilton v. Aston, supra.

[82] Compare Peltier v. Babillion, 45 Mich. 384, 8 N. W. 99 (1881); Shaw v. Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348 (1889), where the payee was designated as "X.'s estate."

84. So, in this case, Richard Grist describing himself in the bill as the agent of his assignees did not give them the legal title to the bill.

The counsel for the plaintiffs insist that the defendant cannot now object to this error, because there was no specific exception taken at the trial. The defendant had placed on the record his plea; it was for the plaintiffs to support the affirmative of the issue arising on that plea. The court misdirected the jury as to the law on the trial of the issue, and told them that the evidence offered was sufficient for the plaintiffs. This error appears on the record, and for that the judgment must be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

PRESIDENT, ETC., OF COMMERCIAL BANK v. FRENCH.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1839. 21 Pick. 486, 32 Am. Dec. 280.)

Assumpsit on a promissory note as follows:

"Boston, Sept. 28, 1835. For value received I, John Thompson, as principal, and I, John French, as surety, jointly and severally promise to pay the cashier of the Commercial Bank, Boston, or his order, nine thousand dollars, on demand with interest. John Thompson.

"John French."

The note was not indorsed.

The defendant insisted that the note was made payable to the cashier, and not to the bank, and, not being indorsed, an action upon it in the name of the bank could not be sustained. The judge overruled the objection, and a verdict was taken for the plaintiff by consent, subject to the opinion of the whole court.[83]

MORTON, J. * * * But the only objection much relied upon, or worthy of much consideration, relates to the form of the action. The note is in terms payable to "the cashier of the Commercial Bank," and the defendant contends that the action should have been brought in the name of the person who was then cashier, and will not lie in the name of the corporation. It is not denied that the property of the note is and ever has been in the plaintiffs; but the argument is that, the promise being in the name of the cashier, although made to him in trust and for the benefit of the corporation, it can only be enforced in his name.

It is a familiar rule of pleading that contracts must be declared on according to their legal import and effect, rather than their literal form. 1 Chit. Pl. (1st Ed.) 299, 302. We should therefore first seek the true import of the contract under consideration. If it be in truth

[83] The statement is abridged, and the arguments of counsel and part of the opinion omitted.

a promise to the individual who was cashier when it was made, and not to the corporation, it is very clear that the plaintiffs cannot maintain this action. For he alone to whom a promise is made, or in whom its legal interest is vested, can enforce its performance or complain of its breach. Hammond on Parties, 4; 1 Chit. Pl. (1st Ed.) 3 to 5, and cases there cited; Allen v. Ayres et al., 3 Pick. 298.

A contract may be made to or with a person, as well by description as by name. And where the parties can be ascertained, it will be valid, although their names be mistaken or their description be incorrect. It cannot be doubted that a note to the Commercial Bank would be valid and might be declared on as a promise to the plaintiffs, although their legal name is "the President, Directors and Company of the Commercial Bank." So a contract with the stockholders, or with the president and directors, or with the directors of the Commercial Bank, would doubtless be, in its legal effects, a contract with the corporation. It is not easy to perceive why a contract with the cashier of a bank is not a contract with the bank itself. The accounts of banks with each other are usually kept in form with the cashiers, but undoubtedly the banks themselves are the real parties to them. Master, etc., of Sussex Sidney College v. Davenport, 1 Wils. 184.

A corporation, being an incorporeal being and having no existence but in law, can neither make nor accept contracts, receive nor pay out money, but by the agency of its officers. They are the hands of the corporation by which they execute their contracts and receive and make payments. Of these officers the cashier is the principal. If the note had been made to the corporation, by its appropriate name, the same officer would have demanded and received payment, or would have given notice of nonpayment and protested it, and, had it been negotiated, would have made the indorsement, and in precisely the same form as he would upon this note.

There are several decisions in our own reports, which support this view of the subject, in cases less strong than the present. In the Medway Cotton Manufactory v. Adams et al., 10 Mass. 360, it was decided that a note payable to Richardson, Metcalf & Co. might well be declared on as a promise to the Medway Cotton Manufactory. In Taunton & South Boston Turnpike v. Whiting, 10 Mass. 327, 6 Am. Dec. 124, it was holden that the promise, in a subscription paper, to pay the assessments which should be made on certain shares to John Gilmore, or order, would support an action in the name of the corporation. And in Gilmore v. Pope, 5 Mass. 491, it was directly decided that an action would not lie upon the same subscription in the name of Gilmore, but must be brought by the corporation. Piggott v. Thompson, 3 Bos. & Pul. 147.

The principle is that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation, whether a right or a wrong name, whether the name of

the corporation or of some of its officers be used, it should be declared on and treated as a promise to the corporation. And there is no so safe criterion as the consideration. If this proceed from the corporation, it raises a very strong presumption that the promise is made to them. If no express promise be made, but it be left to legal implication, it must be to them.

Some later cases have the appearance of clashing a little with the two last above cited. But probably they may be reconciled by a reference to the different nature of the promises declared on and the different state of the facts. In Fisher v. Ellis, 3 Pick. 322, it was decided that a note payable to the treasurer of a parish, though given for the funds of the parish, might well be sued in the name of the treasurer. And in Fairfield v. Adams, 16 Pick. 381, it was holden that a note indorsed to S. S. Fairfield, cashier, would sustain an action in the name of Fairfield. See, also, Little v. O'Brien, 9 Mass. 423; Brigham v. Marean, 7 Pick. 40.

Great favor and indulgence is always shown to negotiable securities. The above cases seem to show that upon such paper, when made in the name of an agent or officer, though the beneficial interest be in the corporation, they may be sued by him. But they do not show that an action might not also be maintained in the name of the corporation. The contrary is plainly intimated in Fisher v. Ellis. It has been the practice to sue towns on notes given by their treasurers. Many such actions have been brought and maintained. See Precedents of Declarations, 111. If a note given by the treasurer of a corporation is the contract of the corporation, we can see no sound reason why a note given to the treasurer should not be an available promise to the corporation.

There is an obvious and broad distinction between the case at bar and those of Fisher v. Ellis and Fairfield v. Adams. Had the note been made to the cashier, by name, the addition of "cashier of the Commercial Bank" might have been considered as descriptio personæ, used to designate as between him and the bank the relation he bore to it in the transaction, and the individual might have been deemed the promisee as in those cases.[84] But such was not the fact, and we discover no valid objection to the plaintiff's recovery.[85]

[84] In such a case as the court supposes the instrument would be payable to the bank prima facie. First Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698 (1871); Johnson v. Bank, 134 Iowa, 731, 112 N. W. 165 (1907); Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13 (1906), a note payable to "X., Pres." Compare First Bank v. McCullough, 50 Or. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758 (1908).

[85] Accord: McBroom v. Corporation of Lebanon, 31 Ind. 268 (1869), a note payable to "treasurer of Lebanon Corporation." Compare Charitable Ass'n v. Baldwin, 1 Metc. (Mass.) 359, 365 (1840); Vermont R. R. Co. v. Clayes. 21 Vt. 30 (1848); Noxon v. Smith, 127 Mass. 485 (1879); Sayers v. Bank, 89 Ind. 230 (1883).

TOLMAN v. AMERICAN NAT. BANK.

(Supreme Court of Rhode Island, 1901, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850.)

Assumpsit. The facts are fully stated in the opinion. Heard on petition of plaintiff for new trial, and new trial granted.

STINESS, C. J. The plaintiff sues to recover money paid out by the defendant, on his account, upon his check, under a forged indorsement. Louis Potter, representing himself to be Ernest A. Haskell, went to the plaintiff to get a loan of money, giving the residence and occupation of Haskell as his own. The plaintiff made inquiry, and finding that Haskell was employed, and was living as represented, he agreed to make the loan. Potter, under the name of Haskell, gave his note to the plaintiff, and the plaintiff gave him a check on the defendant payable to the order of Haskell, delivering it to Potter, supposing him to be Haskell. Potter indorsed Haskell's name on the back of the check, and gave it to A. R. Hines, who collected it from the bank. When the note given to the plaintiff became due, the fraud was discovered. He thereupon notified the bank and demanded a return of the amount paid on the check to the credit of his account.

At the trial a verdict for the defendant was directed, and the plaintiff petitions for a new trial. The question is whether the bank is liable for the payment which it made on this check. It is a fundamental rule of banking that, when a bank receives money to be checked out by a depositor, it is to be paid only as the depositor shall order. The bank assumes this duty in receiving the deposit. If, therefore, it pays out money otherwise than according to such order, it is liable to the depositor for the amount so paid. The bank thus assumes the responsibility of seeing that the money gets to the party authorized to receive it. Hence, if it pays money out on a forged signature, the depositor being free from blame or negligence, it must bear the loss. In this case the plaintiff directed the money to be paid to the order of Ernest A. Haskell. It was not so paid. He did not indorse the check. Potter forged his signature. Under these circumstances, the plaintiff's right to recover seems to be plain.

But the defendant contends that the man who made the contract received the check; that it was intended for him; that the money went to him, and so there was no forgery, and the bank is not liable. It would seem that upon so plain a proposition the decisions should be unanimous; but it is not so. To say that the money was intended for the one who had committed the fraud is simply to say that the fraud was complete. It is a surprising doctrine that, if A. can successfully personate B., he thereby escapes being guilty of forgery in signing B.'s name on a check of C.'s. Of course, C. intended the money to go to him as an actual person, but only because he supposed that he was the person whom he represented himself to be. Can the

imposition upon C. justify A.'s personation and signature of B? If C. had sent his check to B. by A., and the latter had written B.'s indorsement thereon, no one would say that it was not forgery. How does it change the case when A. gets the check by making C. believe that he is B.? In one case C. sent it to B., and in the other he supposed that he handed it to B. directly. In both cases it was intended for B.

The plaintiff's counsel has well said, in this case, that any decision to the effect that a bank is protected in paying a check to an imposter who has forged the payee's name on the check, upon the ground that it carries out the actual intent of the drawer, is based upon a manifest fallacy. Moreover, of what consequence is the intent of the drawer of the check, when the direction is to pay to the party named? He has the right to assume that the bank will pay to the party as directed. In this case the money was intended for Haskell, because his was the only name suggested. He had been looked up, and found to be responsible. It is a perversion of words to say that it was intended for Potter simply because he had fraudulently impersonated Haskell, and led the plaintiff to believe that he was Haskell. The plaintiff did not intend to let Potter have money. His check showed he was not to have it, because it was made payable to Haskell. When, therefore, Potter fraudulently indorsed Haskell's name on the check, it was a typical case of forgery. It was a false signature, with intent to deceive.

The defendant relies on Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471, where the suit was by a holder against the maker of a check. The payee had assumed the name of another and obtained the check as the price for stolen property sold by the defendants as auctioneers. The decision was for the plaintiff, and good ground is given for it in the opinion, in this: that the plaintiff was a bona fide holder without notice, and that the defendants simply supposed the payee to be Charles Barney, of Swanzey, but not from any false representation made to them. Had the opinion stopped there, no case of fraud would have appeared. But the court put these facts aside as immaterial, and then said: "This was the person intended by the defendants as the payee of the check, designated by the name he was called in the transaction, and his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff." No authorities are cited in the opinion, but the case has been cited as an authority since. See Emporia Bank v. Shotwell, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171; United States v. National Bank (C. C.) 45 Fed. 163; Land Title Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717; First National Bank v. Am. Exchange Bank, 49 App. Div. 349, 63 N. Y. Supp. 58.

These cases lose sight of the distinction between real and fictitious

persons. In the latter case there is nobody to inquire about; no one in fact misrepresented; no one in the mind of one party other than the person with whom he is dealing. In the case of a real person, however, one party, having him in mind, satisfies himself about the responsibility of such party, and supposes that he is dealing, not with the person who is in fact before him, but with the one whom he has in mind and whom the one before him falsely personates. Thus in Mead v. Young, 4 D. & E. 28, it was held that, where a bill of exchange got into the hands of one of the same name as the payee, yet such person, knowing that he was not the person in whose favor it was drawn, was guilty of forgery in indorsing it. In Robarts v. Tucker, 16 Q. B. 559, it was held that a banker could not debit his customer with the payment made to one who claimed through a forged indorsement made by the solicitor of the payee. That was not a case of misrepresentation of persons, but it is referred to in Vagliano v. Bank of England, 23 Q. B. Div. 243, as having settled the relations between bankers and customers for many years. This latter case came under the bills of exchange act, and it was held that as the bill was not made to a fictitious or non-existing person, it could not be treated as a bill payable to bearer, and so defendants could not be protected in a payment under a false indorsement. Although this last decision was overruled in L. R. App. Cas. 1891, p. 167, on a close division, Robarts v. Tucker, which was a case of forgery, as this one is, was not overruled.

In Armstrong v. National Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655, it is held that, even where the payee is non-existing, the rule making such paper payable to bearer does not apply where the maker, supposing the payee to be a real person and intending payment to be made to such person, is induced by fraud so to draw it. In Graves v. Am. Exchange Bank, 17 N. Y. 205, it was held to be forgery for one, not the payee of a bill, but bearing the same name, to indorse and transfer it, knowing that he was not intended as the payee. The true rule is well stated in the headnotes of Rogers v. Ware, 2 Neb. 29, as follows:

"If the bill run to a fictitious payee it is as if drawn payable to bearer, and indorsement is not necessary.

"But if it be payable to some person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary.

"Nor is the case changed by the circumstance that the party who induced the drawer to make such bill defrauded him in so doing."

Rowe v. Putnam, 131 Mass. 281, is to the same effect, but is not referred to in Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471.

The attention of counsel was called to the negotiable instruments act (Pub. Laws 1899, c. 674, § 31), which is: "Where a signature is

forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative; and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority."

This statute covers this case. We have referred to authorities because the defendant's counsel so earnestly and ably argued that the act did not alter the law merchant that it seemed proper to show that the law in this respect, outside of the act, is in a very unsatisfactory state and that the act is right. We do not think that the act does alter the law as it was when, a few years ago, it seems to have been switched off on a fallacy in some places. One of the advantages of the act is in settling the question. Waiving the question of forgery, about which the cases we have cited differ, the signature in this case is clearly one "made without the authority of the person whose signature it purports to be," and, therefore, it is "wholly inoperative." This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant and so to estop his present claim. As the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order. The case should have gone to the jury.

New trial granted.[86]

(III) Drawee

REGINA v. HAWKES.

(Court for Crown Cases Reserved, 1838. 2 Moody, C. C. 60.)

The prisoner was convicted before Mr. Justice Bosanquet, at the summer assizes, 1838, at Warwick, of uttering a forged acceptance upon a bill of exchange, knowing it to be forged.

The indictment charged that the prisoner having in his possession a bill of exchange as follows:

"Birmingham, 9th August, 1837.

"£20. Two months after date, pay to my order the sum of twenty pounds for value received. Edward Hawkes,

"General Provision Warehouse, Baker, etc., Unett Street, Well Street, Hockley."

[86] Contra: Hoffman v. Bank, 2 Neb. (Unof.) 217, 222, 96 N. W. 112 (1901); Heavy v. Bank, 27 Utah, 222, 75 Pac. 727, 101 Am. St. Rep. 966 (1904); Jamieson v. Heim, 43 Wash. 153, 86 Pac. 165 (1906). Accord: Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. Supp. 561 (1906). See Heim v. Neubert, 48 Wash. 587, 94 Pac. 104 (1908).

On which was written a forged acceptance as follows:

"Accepted. Payable at Messrs. Gillett and Tawney, Bankers, Banbury. William Sellers,"

—did utter the same knowing the said acceptance to be forged, with intent to defraud John Evans. And in another count with intent to defraud William Sellers.

The prisoner brought the instrument described in the indictment with the acceptance upon it to the house of John Evans, and uttered it to his servant in payment of a debt; the servant seeing that it was not addressed to any one asked who the acceptor was. The prisoner said it was his brother-in-law, named Sellers, a paper-maker near Banbury. The servant observed that it was not indorsed, and desired the prisoner to indorse it, which he did. The prisoner carried on business as a baker in Unett street, but had removed from thence when the bill became due. William Sellers was his brother-in-law and lived near Banbury. He had given no authority to the prisoner to accept the bill.

The case of Gray v. Milner, 8 Taunt. 739, was cited. See, also, Edis v. Bury, 6 B. & C. 433; The King v. Ravenscroft, Russ. & Ry. 161; The King v. Hunter, Russ. & Ry. 511.

The learned judge thought that the writing upon the instrument purported to be an acceptance by Sellers as drawee of the bill, and, if not, that it was an acceptance for the honor of the drawer; and the learned judge sentenced the prisoner to imprisonment and hard labor for two years.

The only question for consideration was whether the instrument upon which the forged acceptance was written was properly described as a bill of exchange, not being addressed to any person as drawee.

This case was considered by all the judges except PARK, J., LITTLEDALE, J., and BOLLAND, B., in Michaelmas term, 1838, and they were of opinion that the conviction was right, except PARKE, B., PATTESON, J., and COLERIDGE, J., who thought otherwise.[87]

FORWARD v. THOMPSON et. al.

(Court of Queen's Bench, Upper Canada, 1854. 12 U. C. Q. B. 103.)

Assumpsit on an instrument in the following words:

"£228. 7s. 6d. Port Hope, December 8, 1853.

"Three months after date, pay to the order of William Thompson, at Port Hope, the sum of two hundred and twenty-eight pounds, seven shillings, and six pence, currency, for value received.

"[Signed] John Thompson."

[87] As to the sufficiency of the designation of the drawee, see Ball v. Allen, 15 Mass. 433 (1819); Alabama Co. v. Brainard, 35 Ala. 476 (1860); Cork v. Bacon, 45 Wis. 192, 30 Am. Rep. 712 (1878).

This was declared upon as a promissory note, made by John Thompson in favor of the defendant William Thompson, who was stated to have indorsed to the defendant John Thompson, who indorsed to the plaintiffs.

Pleas denying the making and indorsing, and other pleas not material to mention.

At the trial at Cobourg, before McLean, J., it was objected that the instrument produced was not a promissory note. Several other objections were raised; but it is only material to notice the one on which the judgment of the court proceeded.[88]

DRAPER, J., delivered the judgment of the court.

The first question to be decided is whether the instrument declared upon in point of law amounts to a promissory note.

The authorities cited (to which may be added Russell v. Powell, 14 M. & W. 418, and Peto v. Reynolds, 18 Jur. 472) establish clearly, as we think, that it could not have been treated and declared upon as a bill of exchange for want of a drawee; and, if not, then those cases which have been decided on the ground that the instrument in question is made in terms so ambiguous as to make it doubtful whether it be a bill of exchange or promissory note, have no application. Then as a promissory note it wants the very essence of a promissory note, that which mainly distinguishes it from a bill of exchange, viz., a promise in terms by the maker, which makes him primarily liable to pay the money. Here are the proper words used, and no others, for drawing a bill of exchange, and if there had been a drawee there would have been no room whatever for treating the instrument as anything but a bill of exchange. But for want of a drawee it is incomplete as a bill of exchange; and for want of a promise it appears to us incomplete as a note. It is quite true that no particular words are indispensable, but that any form of words from which the court can extract an expressed intention to promise to pay are sufficient; but in this case we see nothing but an omission to complete, by adding a drawee's name, what in all other respects is a good bill of exchange, and we cannot find either reason or authority for holding that this is sufficient to convert it into a promissory note.

Rule absolute.[89]

PETO v. REYNOLDS.

(Court of Exchequer, 1854. 9 Exch. 410.)

Assumpsit. The first count charged the defendant as acceptor of a bill of exchange. The second charged him as a maker of a promissory note.

[88] Arguments of counsel are omitted.

[89] Accord: Watrous v. Halbrook, 39 Tex. 573 (1873).

Pleas, to the first count, that the defendant did not accept the bill; to the second count, that the defendant did not make the note. Issues thereon.

At the trial, before Talfourd, J., at the last Bristol assizes, it appeared that the defendant was a merchant at Bristol and owner of a vessel called the "Mary," which, in April, 1852, had sailed from that port to the coast of Africa under the command of one Righton. The plaintiff was treasurer of a foreign missionary society, and the registered owner of a vessel called the "Dove," which had been sent by that society to the coast of Africa. Whilst Righton was at Cameroons in Africa, he there saw the Dove, and agreed with one Saker, an agent of the missionary society, to purchase that vessel for £300, for the purpose of loading the Mary. He paid £100, and, in respect of the residue, Saker drew the following bill in sets:

"Cameroons, September 3, 1852.

"Exchange for £200.

"At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. Peto, Esq., or order, the sum of two hundred pounds sterling for value received, and place the same, as by letter of advice of 3d September, to the account of Alfred Righton."

Across the face of the bill Righton wrote the defendant's acceptance, as follows: "Accepted. Samuel Reynolds, Esq., Shorn Lane, Bedminster, Bristol."

A witness for the plaintiff stated that, in January, 1853, he presented the above bill to the defendant, who denied the authority of Righton to accept bills in his name, but nevertheless promised to pay this bill. It was not, however, clear from the testimony of the witness, whether the defendant had made an absolute promise to pay, or a conditional promise to pay at a future period. The defendant, who was called, denied that he had absolutely promised to pay the bill.

It was objected, on the part of the defendant, that there could be no valid acceptance of a bill which was not addressed to any one. The learned judge told the jury that, if they believed from the evidence that the defendant made an absolute and unconditional promise to pay the bill, that would amount to a parol acceptance of it. The jury found a verdict for the plaintiff on the first count, for the amount of the bill and interest, and for the defendant on the second; leave being reserved to the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly,[90]

PARKE, B. I think that there ought to be a new trial, because the evidence, as to the acceptance of the bill, is unsatisfactory. At the next trial, the parties will have an opportunity of putting on the record the question whether this instrument is a bill of exchange; and

[90] Arguments of counsel are omitted, and the statement is abridged. Pollock, C. B., and Alderson, B., also delivered opinions.

therefore it is not necessary to express any decided opinion on the point. I cannot, however, help observing that, with the exception of Regina v. Hawkes, there is no case in which it has ever been decided that an instrument could be a bill of exchange where there was not a drawer and a drawee. With respect to that case, it does not seem to me entitled to the same weight of authority as a decision pronounced in the presence of the public, and on reasons assigned after hearing an argument in public. I must own that, but for that case, I should have had no doubt that the law merchant required that every bill of exchange should have a drawer and a drawee. This instrument, though in the form of a bill, is not addressed to any one, for I think it impossible to consider the acceptance as an address; but I do not see why the instrument may not be treated as a promissory note, because, upon the face of it, there is a promise to pay the amount written in the name of Samuel Reynolds. Then, if the authority to subscribe his name has been subsequently ratified, that amounts to a promise by him. Therefore, if, on the next trial, there is satisfactory evidence to show that the defendant absolutely promised to pay the amount mentioned in the instrument, he will be liable as upon a promissory note.

MARTIN, B. I am of the same opinion. The verdict is unsatisfactory, and therefore there ought to be a new trial. With respect to the matter of law, if it were necessary to express a decided opinion, I should concur with my Brothers PARKE and ALDERSON. It seems to me that it is absolutely essential to the validity of a bill of exchange, that it should have a drawer and a drawee; and, except for the case of Gray v. Milner, I should have doubted whether the making a bill payable at a particular place was a sufficient address. However, assuming that in this case the defendant made an absolute promise to pay, why may not this instrument be treated as a promissory note? A promissory note need not be in any particular words. Here there is a request to pay a sum of money; then a person accepts that in the name of Samuel Reynolds, which acceptance is a direct engagement to pay. The person so accepting is not Samuel Reynolds, but a person who professes to do it with Samuel Reynolds' authority. Then, if one man professes to make a contract on behalf of another, and that other adopts it, it is the same as if he had made it himself. Therefore, if there was evidence of an absolute undertaking by Samuel Reynolds to pay, this instrument is his promissory note.

Rule absolute.[91]

[91] See Wheeler v. Webster, 1 E. D. Smith (N. Y.) 1 (1850).

"I am of the opinion that the omission of the name of the drawee at the foot of the bill will not vitiate it. The acceptance may be considered as supplying the defect, and as being an admission by the acceptor that he is the person intended. At any rate, it does not lie with him to make such defense, after having admitted, by the acceptance, that he was the person intended, and after having promised to pay the draft at maturity. He is estopped, by his own act, from such a defense." Per Ingraham, J., in Wheeler v. Webster, supra.

ALLEN v. SEA, FIRE & LIFE ASSUR. CO.

(Court of Common Pleas, 1850. 9 C. B. 574.)

Assumpsit. The declaration stated that the defendants theretofore, to wit, on the 28th of October, 1849, made their promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff, in the said note described as Mrs. Ann Allen, or order, the sum of £311. 9s. 6d., thirty days after the date thereof, and that the note was unpaid, etc.

The defendants traversed the making of the note mentioned in the third count.

At the trial, before Wilde, C. J., at the last assizes at Maidstone, the plaintiff put in an instrument in the following form, bearing an 8s. 6d. stamp:

"Marine Department, Sea, Fire, Life Assurance Society.

"31 Cornhill, October 20th, 1849.

"689,617. £311. 9s. 6d.

"To the Cashier:

"Ninety days after date, credit Mrs. Ann Allen, or order, with the sum of three hundred and eleven pounds, nine shillings, and sixpence, claims per 'Susan King,' in cash, on account of this corporation.

"A. Davis,
"W. Ogilvie, } Directors.

"Entered. F. F. A., Accountant."

On the part of the defendants, it was submitted that this was not a promissory note at all, but a mere order for the payment of money. There was a verdict for the plaintiff, but leave was reserved to the defendants to move to set aside the verdict if the court should think the objection well founded. The defendants moved accordingly.[92]

WILDE, C. J. I think there should be no rule in this case. The first objection is that the instrument declared on in the third count is not a promissory note. What is necessary to constitute a promissory note? These parties issue this instrument, importing that the company promise to pay. The note is addressed by the drawers to their own clerk. My Brother SHEE treats the cashier as a drawer. But at the trial it was insisted for the plaintiff that the instrument was precisely what we think it is. The company indicate that they mean to pay, by a direction to their officer to pay—"credit in cash," meaning, as we held in the former case, "pay;" and they point out to whom payment is to be made. It appears to me that the instrument contains all that is essential to constitute a promissory note. * * *

Rule refused.[93]

[92] The statement is abridged, and the arguments and part of the opinion are omitted.

[93] Accord: Roach v. Oster, 1 Manning & R. 120 (1827), an instrument drawn by O., directed to O., and payable to R; Hegeman v. Moon, 131 N.

ALMY v. WINSLOW.

(Supreme Judicial Court of Massachusetts, Bristol, 1879. 126 Mass. 342.)

Contract on the following instrument, declared on as a promissory note:

"New Bedford, April 26, 1870.

"On demand, with interest for value received, please pay Charles Almy, or order, fifty-five and 33/100 dollars.

"George F. Winslow.

"Witness: Asa C. Smith."

Writ dated March 28, 1877, and returnable to the superior court. The defendant demurred, on the ground that the declaration set forth no legal cause of action. The court overruled the demurrer, and the defendant alleged exceptions.

The defendant then filed an answer, admitting the execution of the paper declared on, and that the same was for a valid consideration, and alleging that the cause of action did not accrue within six years. At the trial, before Gardner, J., without a jury, the judge ruled that the instrument declared on was a witnessed promissory note, and was not barred by the statute of limitations, and ordered judgment for the plaintiff. The defendant alleged exceptions.[94]

SOULE, J. The only question in this case is whether the instrument sued on is or is not a witnessed promissory note. That it is witnessed is admitted. The controversy is as to the legal effect to be given to its terms. It does not purport to be a mere acknowledgment of the existence of a debt, and is admitted to have been given for a valuable consideration. It is in the form of a draft or bill of exchange, except that it is not addressed to or drawn upon any one, and therefore lacks one essential characteristic of a bill. It is not in the ordinary form of a promissory note, for it is not in express terms a promise, but a request to pay. It is familiar law, however, that no particular form of words is necessary to constitute a promissory note. There need not be a promise in express terms; it being sufficient if an undertaking to pay is implied in the contents of the instrument. Daggett v. Daggett, 124 Mass. 149; Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462; Carver v. Hayes, 47 Me. 257; Russell v. Whipple, 2 Cow. (N. Y.) 536; Brooks v. Elkins, 2 M. & W. 74.

The instrument sued on was intended by the parties to take effect as a contract. The language imports this; and no other inference can be drawn from the fact that it was given for value. It cannot operate as a draft, check, or bill of exchange, because there is no drawee. One who signed an acceptance on it would not be liable as

Y. 462, 30 N. E. 487 (1892), an instrument in the form of a bill drawn by H. directing her executors, one year after her death, to pay M.

[94] Part of the opinion is omitted.

acceptor of a bill. Peto v. Reynolds, 9 Exch. 410. To be operative at all, as a contract, it must be as a promissory note. It was said in Edis v. Bury, 6 B. & C. 433, by Lord Tenterden, that, "where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or a bill of exchange." In that case the instrument was in the form of a promissory note, but had been accepted by a person whose name had been written on the corner of the paper at which the name of the drawee of a bill is usually placed. The maker, being sued, contended that he was discharged for want of notice of dishonor as drawer of a bill. The court decided otherwise. To the same effect is the decision in Lloyd v. Oliver, 18 Q. B. 471. It has been repeatedly held that, where the drawer and drawee of an instrument in the form of a bill of exchange are the same person, it may be declared on as a promissory note. Miller v. Thomson, 3 Man. & Gr. 576; Allen v. Sea Assur. Co., 9 C. B. 574; Fairchild v. Ogdensburgh, etc., Railroad, 15 N. Y. 337, 69 Am. Dec. 606. The reason is obvious. The drawer of a bill on another assumes only a conditional liability. His contract is that he will pay if duly notified of dishonor of the draft; but when the drawer is the drawee too, such notice would be an empty form, and his undertaking is not conditional, but absolute. The doctrine of the cases cited above on this point is recognized and approved in Commonwealth v. Butterick, 100 Mass. 12.

In view of the foregoing authorities, there seems to be no injustice in holding that an instrument in the form of that sued on is to be regarded, in passing upon the rights of the signer and the payee, as a promissory note. The signer, having made the instrument in the form of a bill of exchange, but without addressing it to any one as drawee, may properly be held to have intended to assume the absolute liability to pay, which he would have assumed if he had addressed the instrument to himself. Any other view makes the instrument valueless. It does not contain anything which informs the payee what is to be done in order to fix the liability of the signer. If the undertaking of the signer is not absolute, it is nothing. * * *

We are of the opinion that the instrument sued on was in legal effect a promissory note, and that, being duly attested, action on it was not barred by the statute of limitations.

Exceptions overruled.[95]

[95] Accord: Didato v. Coniglio, 50 Misc. Rep. 280, 100 N. Y. Supp. 466 (1906); Funk v. Babbitt, 156 Ill. 408, 410, 41 N. E. 166 (1895). In the latter case the court said: "Said instruments were declared on as promissory notes. It is urged that they are not notes, or even promises to pay, and, not being directed to any one, do not constitute drafts or orders, and in fact amount to no more than blank pieces of paper. They are, undoubtedly, very irregular and informal instruments; but they are not void as written evidences of indebtedness. A person may draw a bill upon himself, payable to a third person, in which case he is both drawer and drawee. Here the firm drew bills, but did not address them to any third person or persons, and it is therefore to be regarded that they were in legal effect addressed to them-

selves, as drawees, and the signatures of the firm to the several bills bound the firm both as drawers and acceptors. The instruments are inland bills of exchange, to which the firm sustains the triple relation of drawers, drawees and acceptors, and, as the declaration contains the consolidated common counts, the bills were admissible in evidence under them. Moreover, the drawers and drawees being the same, the bills are, in legal effect, promissory notes, and may be treated as such, or as bills, at the holder's option. 1 Daniel on Neg. Inst. §§ 128, 129."

CHAPTER II

ACCEPTANCE

SECTION 1.—GENERAL AND QUALIFIED ACCEPTANCES

PETIT v. BENSON.

(Court of King's Bench, 1697. Comberbach, 452.)

A bill was drawn upon the defendant, who accepts it by indorsement in this manner: "I do accept this bill to be paid, half in money and half in bills." And the question was whether there could be a qualification of an acceptance; for it was alleged, that his writing upon the bill was sufficient to charge him with the whole sum. But 'twas proved by divers merchants, that the custom among them was quite otherwise, and that there might be a qualification of an acceptance, for he that may refuse the bill totally, may accept it in part; but he to whom the bill is due may refuse such acceptance, and protest it so as to charge the first drawer; and tho' there be an acceptance, yet after that he hath the same liberty of charging the first drawer, as he before had.

BOEHM v. GARCIAS.

(Nisi Prius, before Lord Ellenborough, C. J., 1807. 1 Campb. 425, note.)

Action on a bill drawn on Lisbon, "payable in effective and not in vals reals." The defendant was the drawer of the bill; and the question was, whether it had been dishonored for nonacceptance? The drawees offered to accept it, payable in vals denaros, another sort of currency, which was refused. The defendant now proposed to show that vals denaros was sufficient to answer what was meant by effective. But,

Per Lord Ellenborough. The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in denaros might not have satisfied the term "effective," an acceptance to pay in denaros was not a sufficient acceptance of a bill drawn payable in effective. The drawees ought to have accepted generally, and an action being brought against them on the general acceptance, the question would properly have arisen as to the meaning of the term.

HALSTEAD v. SKELTON.

(Court of Exchequer Chamber, 1843. 5 Q. B. 86.)

Assumpsit. The first count of the declaration stated that William Harland, on, etc., made his bill of exchange in writing, and directed the same to defendant, and thereby required defendant to pay to the order of the said W. H. the sum of £66. 11s. for value received, four months after the date thereof, which period had elapsed, etc., "and the defendant then accepted the said bill, payable at Messrs. Cunliffe & Co.'s, bankers, London." Averment that W. H. indorsed to plaintiff, and that defendant "then promised the plaintiff to pay her the said bill according to the tenor and effect thereof, and of the said acceptance and indorsement."

The defendant demurred, assigning, as a ground, that, although it appears by the first count that the bill therein mentioned was specially accepted by the defendant, and by him made payable at Messrs. Cunliffe & Co.'s, bankers, London, yet it is not averred, nor does it appear from the said count, that the said bill was ever presented at Messrs. Cunliffe & Co.'s for payment, according to the terms of the said acceptance. Another ground assigned was, that the defendant was not stated to have had notice of the indorsement.

On motion in the bail court, in Trinity term, 1842, the demurrer was set aside as frivolous (Skelton v. Halstead, 2 Dowl. P. C. [N. S.] 69); and the plaintiff afterwards signed judgment by default. The defendant then brought error in the Exchequer Chamber, assigning, as error, "that the first count of the said declaration, and the matters therein contained, are not sufficient in law for the said M. S. to have or maintain her aforesaid action," etc. Joinder in error.[1]

TINDAL, C. J. This was an action by the indorsee of a bill of exchange against the acceptor. The declaration stated the bill to have been accepted payable at a particular banker's in London, and did not aver any presentment at the house of that banker; and the question argued before us was, whether the omission of such an averment made the declaration bad. The plaintiff in error contended that it did, for that, since the statute 1 & 2 Geo. IV, c. 78, an acceptance payable at a banker's generally without restrictive words, is a general acceptance, and ought to be so pleaded; whereas, by declaring, as in this case, on an acceptance payable at a bankers, the plaintiff must be understood as referring to an acceptance payable at a banker's only, and not elsewhere. And, if the plaintiff in error is right in this proposition, it must certainly follow that the declaration is bad for not averring performance of what, according to his argument is a condition precedent to any right of action, namely, a presentment at the banker's.

But we are of opinion that the argument of the plaintiff in error cannot be supported.

[1] The arguments of counsel are omitted.

The statute enacts that, where a bill is accepted payable at a banker's, without further expression in the acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill; but the meaning of this enactment is, not that, in such a case, presentment at the banker's shall be an invalid presentment, but that, in an action against the acceptor, presentment to him shall be good, and consequently that it shall be unnecessary to present or to aver presentment at the banker's. A bill of exchange drawn generally on a party may be accepted in three different forms; either generally, or payable at a particular banker's, or payable at a particular banker's and not elsewhere. If the drawee accepts generally, he undertakes to pay the bill at maturity when presented to him for payment. If he accepts payable at a banker's, he undertakes (since the statute) to pay the bill at maturity when presented for payment either to himself or at the banker's. If he accepts payable at a banker's and not elsewhere, he contracts to pay the bill at maturity provided it is presented at the banker's but not otherwise.

Here the bill was accepted according to the second of these three forms, i. e., payable at a banker's, without any restrictive words; so that presentment at the banker's (though if made it would have been a good presentment) was yet not, as against the acceptor, necessary. Acceding, therefore, as we do, to the argument of the plaintiff in error, that the bill must be taken to have been pleaded according to its legal effect, we do not go along with him in the conclusion at which he arrives. For the reasons which we have given, we do not think that, in this case, the legal effect of the bill, as pleaded, was to render necessary any presentment at the banker's; and the judgment of the court below will therefore be affirmed.

Judgment affirmed.

PECK v. COCHRAN.

(Supreme Judicial Court of Massachusetts, 1828. 7 Pick. 34.)

Assumpsit on an order, dated April 1, 1821, payable at sight, drawn by the deputy Postmaster General of the United States, at Washington, upon the defendant, who was postmaster at Watertown, in this state, in favor of the plaintiffs.

At the trial before Parker, C. J., it appeared that the plaintiffs sent the bill for collection to S. Burt, who delivered it to J. Sawyer, with directions to call on the defendant and demand payment. Sawyer testified that in the early part of May he presented the bill for acceptance and payment; that the defendant said he did not think the money was due to the government; that the witness pressed him to pay the bill; that the defendant refused to pay then, but said he would answer it at the commencement of the next quarter, which would be in about 60 days. The witness did not agree to wait, but told the defendant he

would return the bill to Burt, who would send it to Washington. The defendant was irritated, and intimated that he did not care if it was sent to Washington. The witness afterwards, in September, called again on the defendant, who again refused to pay, saying that if the witness had called at the commencement of the quarter next after the time of the first presentment, he should have paid it, but that he had accepted other drafts presented since, and he would not pay it.

The plaintiffs offered to show that the defendant, at the time of the first presentment, was indebted to the United States in a larger sum than the amount of the bill; but the evidence was deemed irrelevant.

A nonsuit was entered by consent, which was to be taken off, if the above testimony was sufficient in law to authorize a verdict in favor of the plaintiffs.

PER CURIAM. It appears clearly that there was no contract between the parties. The offer to pay at a future day would have been an acceptance, had the plaintiffs' agent acceded to it; but he did not, and said he should return the bill. The circumstance of the defendant's having funds at the time of the presentment is immaterial and the evidence of it was rightly rejected.

Nonsuit made absolute.

CAMPBELL v. PETTENGILL.

(Supreme Judicial Court of Maine, 1830. 7 Greenl. 126. 20 Am. Dec. 349.)

Assumpsit for the price of certain logs sold, with a count on an order for the same sum, drawn by the defendants, as follows:

"Orono, June 13, 1827. Thomas Bartlett, Esquire, Collector and Treasurer of the Penobscot Boom Corporation: Please to pay Henry Campbell, or the bearer, ninety-seven dollars and seventy-seven cents, being for value received." This order was accepted in these terms: "July 9, 1827. Accepted to pay when in funds of the Penobscot Boom Corporation. Thomas Bartlett, Treasurer of said Corporation." * * *

At the trial it appeared that the treasurer had no cash funds of the corporation in his hands, but held its negotiable securities to the amount; that he had not paid the draft to the plaintiff. Verdict for defendant. Plaintiff excepted.[2]

WESTON, J. * * * The plaintiff, the payee, and holder of the bill might have required an absolute acceptance, without which he might have treated the bill as dishonored; but having received a special and conditional acceptance, he must abide by its terms. Parker v. Gordon, 7 East, 387; Gammon v. Schmoll, 5 Taunt. 344; Sebag v.

[2] The statement is abridged, and the arguments of counsel and part of the opinion omitted.

Abitbol, 5 Maule & S. 462. It does not appear that there has been any failure, on the part of the acceptor, to pay according to the terms of the acceptance. He was to pay, when in funds of the Penobscot Boom Corporation. He had no cash funds at the time, but he had demands which were good and available, and subject to his control as treasurer. But these, until collected, were not funds, within the meaning of the acceptance. He has paid one-half the bill; and is holden to pay the residue when in funds. Under these circumstances, independent of the objection arising from the want of notice, it cannot be pretended that there is any legal ground to charge the drawers, until there has been a violation of the terms of the acceptance. No evidence to this effect has been adduced; but the testimony was that, up to the time of trial, the acceptor had no funds of the Boom Corporation with which to pay the bill. Upon this ground, we are satisfied that the verdict is right. The exceptions are accordingly overruled; and there must be

Judgment for the defendants.

HEENAN v. NASH.

(Supreme Court of Minnesota, 1863. 8 Minn. 407 [Gil. 363]. 83 Am. Dec. 790.)

FLANDRAU, J. Action on bill of exchange against acceptor. On the 18th day of September, 1858, the defendant, Patrick Nash, and one William B. McGrorty were partners under the name, firm, and style of "Nash & McGrorty." On that day Patrick Murnane drew the bill in question on the said firm, in favor of William Devine, and to his order, payable in one month from date. William Devine indorsed the bill to the plaintiff, who, on the 25th day of July, 1859, presented the same to Patrick Nash, who accepted it by writing on its face the following words: "Accepted this 25th July, 1859."

The statute of this state, on the subject of acceptances, is as follows: "No person within this territory shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent." Pub. St. p. 375, § 7.

We will have to consider, in deciding this case, two questions: First, whether the acceptance by Nash was good as a partnership acceptance, and binding on the firm; and, second, whether it was competent for him to accept the bill as an individual, and incur a liability against himself alone. If the acceptance was binding upon the firm, the action is well brought against one of the members. Pub. St. p. 536, § 38, provides, that "any one of the joint associates may also be sued for the obligations of all." If the liability was individual, the acceptor was, of course, the proper defendant.

In the case of Mason v. Rumsey, 1 Camp. 384, it was held that an

acceptance by one member of a firm in his own name would bind the firm when the bill was drawn on the firm. The same was again held in Wells v. Masterman, 2 Esp. 731. This doctrine seems to have been adopted in Collyer on Partnership, § 410, and in Byles on Bills, 144, on the authority of these cases, and some others there collected. In the case of Dougal v. Cowles, 5 Day (Conn.) 511, the same is again laid down on the authority of the case of Mason v. Rumsey. There are other cases that hold an acceptance by a member of a firm, in a name other than the firm name, to raise a question of fact, to be left to the jury, whether the name used substantially describes the firm, or whether it so far varies that the acceptor must be taken to have made it on his own account. See Faith v. Richmond, 11 Adol. & E. 339, 39 Eng. Com. Law Rep. 113; Drake v. Elwyn, 1 Caines (N. Y.) 184.

Acceptances could formerly be made by parol, which was the law in Connecticut at the time of the decision cited from 5 Day, and that point is expressly made by the court in deciding the case. The same may be said of the case of Mason v. Rumsey, which was decided before the statute of 1 & 2 Geo. IV. c. 78, § 2, which provided that acceptances, to be valid, must be in writing. Even after this statute the English courts have held that the word "Accepted," written on the bill by one having authority, is sufficient to bind the drawees. The only principle upon which the courts have held that an acceptance by one partner in his own name will bind the firm is the implied authority which each member has to act for the whole, and when the bill is drawn upon the firm, and accepted by one, they hold that he intended to accept it as drawn.

I find one English case, decided in the Court of Exchequer in 1841, which holds a doctrine much more in accordance with our views of the principles which should govern the question. In Kirk v. Blurton, 9 Mees. & W. 283, the defendants were partners under the name of "John Blurton." One of the firm drew a bill in the name of "John Blurton & Co." The firm was sued upon it, and the partner who did not draw the bill defended. Faith v. Richmond, Mason v. Rumsey, and other cases, were cited. Alderson, B., in delivering the opinion, says: "The court do not entertain any doubt as to the principles of law applicable to this case. One partner can bind his copartner only to the extent of the authority which is given to partners generally, to enable them to carry on the partnership business," which authority he says, in another part of the opinion, is "to bind the firm in the name of the partnership, and in that only."

Since the passage of our statute on the subject of acceptances, no inferences can be indulged in. To make an acceptance valid, it must be in writing, signed by the acceptor or his lawful agent. Mr. Nash, as a partner of the firm of Nash & McGrorty, had a right to accept the bill for the firm by virtue of his general powers as a partner, but this power of a partner is to bind the firm by the use of the firm name.

and in no other way. This he did not do, and we are clear that the acceptance cannot be held to bind the firm.[3]

We are next to consider whether the defendant can be held as acceptor individually. It is a well-settled rule of commercial law that no one can accept a bill but the person upon whom it is drawn, except for honor. Polhill v. Walter, 3 Barn. & Adol. 114; Davis v. Clark, 1 Car. & K. 177; May v. Kelly, 27 Ala. 497. If a bill is drawn upon A., and B. accepts it, the act is merely voluntary, without any consideration, and creates no liability whatever in the law. It is allowed, for the convenience of commerce, that a person other than the drawee may, after presentation, refusal, and protest, accept, for the honor of the drawer, or any of the indorsers, or of all the parties as he may see fit; but this is a well-understood transaction, and is done supra protest, and under certain well-settled forms and ceremonies. There is no pretense that Mr. Nash was such an acceptor of the bill in question.

Where a bill is drawn upon several individuals, an acceptance by any one of them is binding upon him, although the bill may be treated, and should be, as dishonored, if not accepted by all the drawees, because the holder is entitled to the acceptance of them all; but in such case a liability accrues against the party accepting, because he is a drawee, as much as if the bill had been drawn upon him alone. Where, however, the bill is drawn upon a firm, any member of the partnership, in his individual capacity, is quite as much a stranger to the same as a third person. He is only connected with the bill through his membership of the firm, which is drawee, and in virtue of such membership he has power to use the firm name in accepting it. If he accepts it in his individual name he does not bind the firm, and there is no consideration for his act. It is the case of a bill drawn on one party and accepted by another.

The court, in deciding the case below, after stating that, "if one of several parties to whom a bill is addressed accepts the same, such acceptance will bind him," adds, in another part of the opinion: "It can hardly be said that one of two or more partners, upon whom a bill is drawn, is so far a stranger to the bill that an acceptance will not bind him. If one of several persons, between whom no business relations exist, can bind himself, by accepting a bill drawn on all, it is not perceived why any one of several partners may not do the like." We have endeavored to show the error of this position above. In the case

[3] "The action is not upon the bill of exchange, * * * but is for goods sold and delivered. But were it otherwise, as the bill was drawn upon the partnership for goods sold to the partnership, an acceptance by one partner in his own name would bind the firm. This is too well settled to require the citation of authorities in its support." Per Cole, J., in Tolman v. Hanrahan, 44 Wis. 133, 135 (1878).

A note signed by the partner in any other than the firm name would not be the note of the firm. Palmer v. Stephens, 1 Denio (N. Y.) 471 (1845); Tilford v. Ramsey, 37 Mo. 563, 567 (1866).

of a bill drawn upon several individuals, "between whom no business relations exist," each is a drawee in his individual capacity, and competent as such to accept; but, in the case of a bill drawn upon a firm, the association, and not the individual members thereof, is the drawee, and an acceptance by one member in his own name is not an acceptance by the drawee. The complaint is demurrable, and the demurrer should have been sustained.

Order overruling demurrer reversed.[4]

SECTION 2.—FORM OF ACCEPTANCE

ERESKINE v. MURRAY.

(Court of King's Bench, 1728. 2 Str. 817.)

In case upon a bill of exchange against the acceptor, it was alleged generally, quod acceptavit. And on demurrer to the declaration exception was taken, that by 3 Anne, c. 9, the acceptance must be in writing, and therefore this ought to be alleged to be so.

Sed PER CURIAM. Acceptavit is enough, and if writing is necessary, it will be implied.[5] Besides, the writing required by the statute is only in order to make the drawer liable to damages and costs. The plaintiff must have judgment.

WYNNE et al. v. RAIKES et al.

(Court of King's Bench, 1804. 5 East, 514.)

The first count of the declaration stated, that on the 9th of November, 1801, Aquila Brown drew a bill of exchange on the defendants for £500. payable to the order of Thomas Andrews and Butler at 60 days' sight; that Thomas Andrews and Butler indorsed the said bill to the plaintiffs; and that the defendants upon sight thereof, duly accepted the bill. There were also counts for money paid, and for money had and received. The defendants pleaded the general issue,

[4] Contra: Owen v. Van Uster, 20 L. J. C. P. 61 (1850).

"The only objection made to the fifth and sixth counts is that the building committee as an official body is the drawee, and the order cannot be accepted by individuals. But it does not appear that the committee differs from any association of individuals; and an order drawn upon it is drawn upon a number of individuals associated together, but not incorporated nor copartners. In such case, although a bill may be treated as dishonored if not accepted by all the drawees, if accepted by a part it will be a good acceptance as to them." Smith v. Milton, 133 Mass. 369–371 (1882).

[5] Accord: Barnsdall v. Waltemeyer, 142 Fed. 415, 419, 73 C. C. A. 515 (1905).

and at the trial before Lord Ellenborough, C. J., at the sittings after last Hilary term at Guildhall, a verdict was found for the plaintiffs for £555. subject to the opinion of this court on the following case:

On the 9th of November, 1801, Aquila Brown, who resides at Baltimore, in North America, drew the bill of exchange in question at that place upon the defendants, who reside in London, and for a valuable consideration paid the bill to Thomas Andrews and Butler, residing in Baltimore, who afterwards, for a valuable consideration, indorsed it to the plaintiffs, who reside in London. On the 9th of November, 1801, Aquila Brown, by letter of that date, advised the defendants of having valued on them by divers bills amounting together to £5,548. 14s. 2d. sterling, of which the bill in question was one, the amount of which bills Aquila Brown in that letter requested the defendants to honor with acceptance, and place the amount to his debit, and which letter of advice was duly received by the defendants. The plaintiffs, on receiving the bill in question in England, presented it on the 2d of January, 1802, to the defendants for their acceptance, but the defendants refused to accept it. On the 13th of January, 1802, the defendants wrote a letter to Aquila Brown, the drawer, which letter after mentioning some damage which the cargo of the Chesapeake, consigned to the defendants, had sustained, and difficulties in which it had been involved; as also an attachment laid upon the property of Aquila Brown in the hands of the defendants (among other things), contains the following passages: "Under these circumstances, while your property in the Chesapeake appeared in so very questionable a state that we could not tell what security to rest upon it, you could not expect that we could interfere for any of your bills refused by Mr. Mangin, or even accept all the bills of yours which came in upon us. Several of them of course have been noted for nonacceptance, and Messrs. Finlay Bannatyne & Co. have officiously sent you a protest on that for £551. 15s. for nonacceptance. We have however now the satisfaction to mention to you that Mr. Mangin, having resolved to pay many of your bills on him, Messrs. Mellish & Co. have taken off the attachment in our hands, and since the receipt of Messrs. Muilman's letter, of the 5th instant, our prospect of security on the Chesapeake is so much improved that we shall accept or certainly pay all the bills which have hitherto appeared; the one for £6,500., the 19th of October, has not yet been presented to us, but we will hope that the state of your funds will likewise permit us to take care of that." The bill in question was one of those which had appeared prior to the writing the above letter of the 13th January, 1802, and which letter was received by Aquila Brown in America on the 19th March, 1802. On the 6th of March, 1802, which was 60 days and 3 days of grace after the bill in question was presented for acceptance, the plaintiffs presented the bill to the defendants for payment; but the defendants refused to pay the same, and the plaintiffs caused it to be protested for nonpayment. Aquila Brown, the drawer of the bill, was at the time the same was drawn

indebted to the defendants in the sum of £5,000. and hath so continued to the present time. The question for the opinion of the court was, Whether the plaintiffs were entitled to recover? If the court should be of that opinion, the present verdict to stand; if otherwise, a nonsuit to be entered.[6]

Lord ELLENBOROUGH, C. J., delivered judgment.

This case, in all its material circumstances, resembles that of Powell v. Monnier, 1 Atk. 611, the authority of which has not been, as far as we have been able to find, ever shaken. The letter of the defendants, stated in the case to have been written on the 13th of January, 1802, to Aquila Brown, the drawer, when the bill in question, amongst others drawn by him upon them, had been refused acceptance, after commenting upon the circumstances which had before made the property of the drawer appear to them, the defendants, to be in a very questionable state, particularly in respect to what the drawer had in the Chesapeake, says: "Our prospect of security in the Chesapeake is so much improved that we shall accept or certainly pay all the bills which have hitherto appeared." And the first question in this case is, Whether this promise be an acceptance? If either branch of the alternative contained in this promise would be an effectual acceptance, if standing alone, surely it cannot be less so because the promise is couched in terms of an alternative of which each branch is an acceptance. A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise therefore to do the one or the other—i. e., to accept or certainly pay—cannot be less than an acceptance. It amounts, I think, in effect to this: "Whether we shall send for the bill again, and accept it in form or not, is uncertain, but at any rate you may depend upon its being paid." Supposing it to be an acceptance, the time when it is to be considered as made, namely, Whether at the date of the letter, or at the time when it reached the drawer to whom it was written in America (which was on the 19th of March, 1802, after the bill had become due), is immaterial, inasmuch as an acceptance after the time appointed for the payment of a bill is good. Jackson v. Piggot, 1 Ld. Raym. 364, Salk. 127, and Mutford v. Walcot, 1 Ld. Raym. 574, Salk. 129, etc.

The second question in this case is, Whether, inasmuch as the bill was not taken by the holders upon the credit of this promise of the defendants so made to the drawers, nor was the same known to them to have been made at all till after the bill was due, they, the holders, can avail themselves of it as an acceptance? In the case of Powell v. Monnier, already mentioned, that which was holden an acceptance inuring to the benefit of the indorsees, the plaintiffs, was an acceptance contained in a letter to the drawer, one Newburgh, promising, "that his bill should be duly honored." The promise, being long subsequent to the time when the plaintiffs in that case became possessed of the bill by indorsement,

[6] The arguments of counsel are omitted.

could of course have formed no part of their original inducement to take it. And the promise was in that case, as well as in this, made to a drawer, who had drawn without having any effects in the acceptor's hands; and it does not appear in the one case more than in the other that the holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied prior to the time when the bill became due. Without oversetting the authority of the case of Powell v. Monnier, we cannot say that the plaintiffs are not in the present case, which so entirely resembles it, entitled to recover. And as in adhering to it we violate no principles of commercial convenience, but confirm a rule of law, which we find established on a subject which least of all others endures uncertainty and change, we cannot do otherwise than hold the plaintiffs in this case entitled to recover.

Postea to the plaintiffs.[7]

COOLIDGE et al. v. PAYSON et al.

(Supreme Court of the United States, 1817. 2 Wheat. 66, 4 L. Ed. 185.)

MARSHALL, C. J., delivered the opinion of the court.

This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors.

At the trial the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the Hiram, claimed by Cornthwaite & Cary, which had been captured and libeled as lawful prize. The cargo had been acquitted in the District and Circuit Courts, but from the sentence of acquittal the captors had appealed to this court. Pending the appeal Cornthwaite & Co. transmitted to Coolidge & Co. a bond of indemnity,

[7] No acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him. Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, § 6 (1856).

executed at Baltimore with scrolls in the place of seals, and drew on them for $2,700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co. and protested for nonacceptance. After its protest Coolidge & Co. wrote to Cornthwaite & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say: "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for $2,000 will be honored."

On the same day Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say: "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which, we shall wholly rely on your judgment. You mention the last surety as being responsible. What think you of the others?"

In his answer to this letter, Williams says: "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwaite & Cary, and paid to Payson & Co. in part of the protested bill of $2,700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond

referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same, and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover on the present action, and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him.

To this charge the defendants excepted. A verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Cary contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favour of a person who takes it for a pre-existing debt?

In the case of Pillans & Rose v. Van Mierop & Hopkins, 3 Burr. 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case, and that under the consideration of the court, no essential distinction is perceived. But it is contended that the authority of the case of Pillans & Rose v. Van Mierop & Hopkins is impaired by subsequent decisions.

In the case of Pierson v. Dunlop et al., Cowp. 571, the bill was drawn and presented before the conditional promise was made on

which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield, in delivering his opinion, contradict those laid down in Pillans & Rose v. Van Mierop & Hopkins. His Lordship observes: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, "He will duly honor it," is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of Pillans & Rose v. Van Mierop & Hopkins had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of Pierson v. Dunlop certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued that those circumstances to which Lord Mansfield alludes must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with circumstances"; but it is not said that the answer must contain those circumstances. In the case of Pierson v. Dunlop, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept as an acceptance is that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and, if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of Mason v. Hunt, Doug. 296, Lord Mansfield said: "There is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon

it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange"? It is the promise to accept—the naked promise. The motive to this promise need not, and cannot, be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of Pillans v. Van Mierop the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of Johnson and Another v. Collins, 1 East, 98, Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. In the case of Johnson v. Collins, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Lord Mansfield in the case of Pierson v. Dunlop; and Lord Kenyon said that "this was carrying the doctrine of implied acceptances to the utmost verge of the law, and he doubted whether it did not even go beyond it." In Clarke and Others v. Cock, 4 East, 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter to be a virtual acceptance. It is true, in the case of Clarke v. Cock, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction, and in Pillans & Rose v. Van Mierop & Hopkins, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept as an acceptance is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

Judgment affirmed.

SPEAR & PATTEN v. PRATT.

(Supreme Court of New York, 1842. 2 Hill, 582, 38 Am. Dec. 600.)

Assumpsit, tried at the Onondaga circuit, in September, 1841, before Moseley, C. J. The action was against the defendant, Frederick Pratt, as acceptor of a bill of exchange, payable to the order of the plaintiffs. The defendant's name was written across the face of the bill; and the question was whether this was such an acceptance as is required by the statute. It was admitted that the defendant, at the time of the acceptance, was a resident of this state. His counsel insisted at the trial that the acceptance was insufficient to charge him, but the circuit judge, being of a different opinion, directed the jury to find for the plaintiffs, which they accordingly did; and the defendant's counsel, having excepted, now moved for a new trial upon a bill of exceptions.

COWEN, J. Any words written by the drawee on a bill, not putting a direct negative upon its request, as "Accepted," "Presented," "Seen," the day of the month, or a direction to a third person to pay it, is prima facie, a complete acceptance, by the law merchant. Bayley on Bills (Am. Ed. 1836) 163, and the cases there cited. Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance—a signing by the drawee. "It may be," says Chitty, "merely by writing the name at the bottom or across the bill;" and he mentions this as among the more usual modes of acceptance. Chitty on Bills (Am. Ed. 1839) 320.

It is supposed that the rule has been altered by 1 Rev. St. (2d Ed.) p. 757, § 6. This requires the acceptance to be in writing, and signed by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a writing and sign-

ing. The statute contains no declaration that it should be considered less. An indorsement must be in writing and signed; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular place, and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored periphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee's name—the word "Accepted," at least. That may be so; but it is enough for us to see that both the terms and the spirit of the act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

New trial denied.[8]

LUGRUE v. WOODRUFF.

(Supreme Court of Georgia, 1860. 29 Ga. 648.)

This was an action by James F. Lugrue against Minus W. Woodruff on a draft, of which the following is a copy, viz.:

"Chattanooga, January 23, 1858.

"164. Three days after date, pay to the order of myself one hundred and sixty-four dollars, value received, and charge the same to account of 202 sacks oats, marked W. [Signed] R. Hooper.

"To M. W. Woodruff, Augusta, Ga."

Indorsed: "Pay James F. Lugrue. [Signed] R. Hooper."

[8] Section 6: "No person within this state shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself, or his lawful agent."

Section 7: "If such acceptance be written on a paper, other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration."

Section 8: "An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance, in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration."

1 N. Y. Rev. St. (2d Ed.) p. 757.

Many states have or had statutes to the same effect. See Stimpson, Am. Stat. Law, § 4720.

Sections 6, 7, and 8, above, which related to nonnegotiable as well as negotiable bills, were repealed by section 341, the general repealing section, of the New York negotiable instruments law (chapter 612, Laws 1897).

In Nelson v. Nelson, 31 Wash. 116, 71 Pac. 749 (1903), section 132 of the negotiable instruments law was held applicable to a nonnegotiable bill. But see Westberg v. Lumber Co., 117 Wis. 589, 94 N. W. 572 (1903).

Noted and protested for nonacceptance January 27, 1858.

Noted and protested for nonpayment January 29, 1858.

Plaintiff, at the trial, offered the draft in evidence, to which defendant objected, on the ground that it was not accepted on its face. The court sustained the objection, and plaintiff excepted.

Plaintiff then offered in evidence the following letter from defendant to Hooper, the drawer of the draft, as evidence of acceptance:

"Augusta, January 26, 1858.

"Mr. R. Hooper—Dear Sir: Your draft on the oats at three days was presented to-day for payment, and the oats not yet arrived, and money as tight as bricks. It is almost impossible to collect anything here. It is utterly impossible for me to pay the draft to-day; but as soon as the oats get here I can realize on them immediately, and will then attend to the draft. It will be all right in a few days. If the draft should come back to you, have it sent down again, and I will certainly arrange it; and send on all the oats you can. Our market is almost entirely bare of them and a good demand at 60 to 65 cents.

"Respectfully, M. W. Woodruff."

Defendant objected to this letter, on the ground that it was not an acceptance as to third persons, whatever it might be as to Hooper. The court sustained the objection, and plaintiff excepted.

Plaintiff then proposed to prove that the conditions expressed in the letter had been performed; that the oats did arrive and were sold, and the draft sent back to defendant. The court rejected this evidence also, and plaintiff excepted.

There being no further evidence, plaintiff was nonsuited, and therefore tendered his bill of exceptions, assigning as error the above rulings and decisions.

LUMPKIN, J. The proof in this case did not go far enough. It should have been shown, either that the letter written by Woodruff, and which we hold to be a sufficient acceptance, was written to Hooper before the draft was indorsed to the plaintiff, which we are quite sure was not the fact, or that the paper, after acceptance was refused, was returned to Hooper, and redelivered by him to Lugrue, who took it upon the faith of the letter, or, that he advanced money or paid something of value upon it. If this proof can be supplied, the plaintiff will be entitled to recover. As the testimony stands, however, we hold, the judge was right in awarding a nonsuit.

Judgment affirmed.[9]

[9] Accord: Eakin v. Bank, 67 Kan. 338, 72 Pac. 874 (1903), a case of a telegraphic acceptance, decided under a statute copied from 1 N. Y. Rev. St. (2d Ed.) p. 757, § 7.

JONES v. COUNCIL BLUFFS BRANCH BANK OF IOWA.

(Supreme Court of Illinois, 1864. 34 Ill. 313, 85 Am. Dec. 306.)

BECKWITH, J. This is an action of assumpsit to recover the sum of money mentioned in a draft dated July 16, 1861, drawn by Green & Stone on the appellants, alleged to have been verbally accepted by them, but protested for nonacceptance. The defense was that the promise of the appellants to accept did not constitute an acceptance, that such promise was obtained by fraud, and that its consideration had failed. On the trial, the plaintiffs offered in evidence the draft and a written agreement of Green & Stone, dated August 1, 1861, by which they transferred to the appellants all their interest in certain property and claims for commissions, in consideration of the appellants undertaking to pay the draft in question. The plaintiffs also offered evidence tending to prove that the appellants promised Green & Stone that they would accept and pay the draft, and that the appellees, after they had taken it, were informed of this undertaking. A promise by the drawee to pay an existing bill is an acceptance, or, in law, amounts to an acceptance, whether the bill was taken upon the faith of the promise or not. A promise to any person interested in having a bill paid inures to the benefit of the holder. These principles were settled in the time of Lord Ellenborough, and a reference to any of the text-books will furnish the names of a great number of cases in which they have been acted upon in England and in this country. They are too well settled to be discussed at the present day. The court below found there was no fraud in obtaining the promise, and we are entirely satisfied with its finding.

The appellants' agreement to accept the bill was for the benefit of its holders; and the agreement of Green and Jones that the net proceeds of the property and the commissions transferred to the appellants should amount to a certain sum was solely for their benefit. The nonperformance of the latter agreement furnishes no excuse for not accepting and paying the bill. The agreements were not intended to be dependent on each other. The undertaking on the part of the appellants was that they would pay the bills when they became due. They were to convert the property transferred to them into money at the best price they could obtain for it, and ascertain the amount of the commissions; and if these sums did not amount to sufficient to pay the bills which they undertook to pay, Green and Jones undertook to pay them the difference. Such was the legal effect of their agreement. We do not deem it necessary to make a critical examination of the special pleas filed by the appellants. All the matters set up in them were admissible in evidence under the general issue, and on the trial were given in evidence under it. The appellants have had all the benefit which they can derive from the facts; and if the demurrer to some of

the pleas was improperly sustained, we should not reverse the judgment after the appellants have had the full benefit of their defense under the general issue. Atlantic Ins. Co. v. Wright, 22 Ill. 462.

Perceiving no error in the record, the judgment of the court below will be affirmed.[10]

JARVIS v. WILSON.

(Supreme Court of Errors of Connecticut, 1878. 46 Conn. 90, 33 Am. Rep. 18.)

See ante, p. 29, for a report of the case. Held by statute as not common law acceptance must be in writing.

LEWIN v. GREIG, JONES & WOOD.

(Supreme Court of Georgia, 1902. 115 Ga. 127, 41 S. E. 497.)

FISH, J. Lewin brought his action, on a bill of exchange, against Greig, Jones & Wood as acceptors, L. F. Wood as drawer, and James Dixon as indorser, in which it was sought to hold Greig, Jones & Wood liable on a parol acceptance of the bill. With reference to the parol acceptance the allegations of the petition were as follows:

"Par. 6. Petitioner further shows that he was a merchant doing business in the city of Savannah, and that the said Dixon, who is a colored man, and a total stranger, came into his store to purchase certain goods, and exhibited to him the draft in question; that then James Dixon selected the articles he desired to purchase, and before delivering to him the articles he went to the office of Greig, Jones & Wood, in the city of Savannah, to inquire as to whether the draft was good, and whether they would accept the draft, and was then and there told that the draft was 'as good as gold,' and they would and did accept it, and it would be paid in a few days, but petitioner shows that they have failed to accept formally, and refused to pay, same.

"Par. 7. Petitioner shows that he relied entirely upon the statement of said Greig, Jones & Wood, * * * and it was only upon the faith of their assurance of the payment of the draft that the goods were furnished; * * * that the draft was accepted as to payment of petitioner and the goods finally delivered."

No defense was made by Wood or Dixon. Greig, Jones & Wood moved to dismiss the petition upon the ground "that said draft shows on its face that these defendants never accepted the same in writing." This motion the court sustained, and dismissed the petition, to which ruling the plaintiff excepted.

10 Accord: Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245 (1875); Davis v. Rittenhouse, 72 Ill. App. 58 (1897).

Under Civ. Code, § 2693, par. 8, to make an acceptance of a bill of exchange binding, it must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized so to do. Counsel for the plaintiff in error contend that the allegations of the petition, as quoted above, take the present case out of this rule and bring it within the exception thereto contained in section 2694, par. 3, which provides that the previous section does not apply "where there has been such part performance of a contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance." The case of Saulsbury, Respess & Co. v. Blandy, 53 Ga. 665, and 60 Ga. 646, is cited to support such contention. It was in that case held (60 Ga. 646): "Where property was sold and delivered to a third person on the faith of the promise of the defendants to accept his draft on them for the purchase money, a specific performance of the contract will be enforced." In that case the complainants, the Blandys, were induced to sell an engine to Wimberly on credit, and to deliver the same to him, by the promise of the defendants, Saulsbury, Respess & Co., to accept Wimberly's draft for the price of the engine; and when complainants had performed their part of the contract made with defendants, by parting with the property, the defendants were forced to specifically comply with their part of such contract. In the case now in hand, the plaintiff sought to recover on a parol acceptance, and while the petition alleged that, before he sold the goods to Dixon, plaintiff made inquiry of Greig, Jones & Wood as to the draft, and they informed him it was good and thereupon accepted it in parol; that he relied entirely upon their statement, and it was only upon the faith of their assurance that the draft would be paid that he sold the goods to Dixon—yet there is no intimation in the petition that Greig, Jones & Wood agreed to accept the draft if the plaintiff would sell the goods to Dixon. Indeed, it does not appear that they even knew that the plaintiff contemplated making such a sale. This being true, how can the sale and delivery of the goods by the plaintiff to Dixon be such part performance as would render it a fraud on the part of Greig, Jones & Wood not to comply with their parol acceptance? They were not parties to the contract of sale; they knew nothing about such contract between the plaintiff and Dixon; and the fact that the plaintiff complied with his part of the contract that he made with Dixon surely cannot be said to be such part performance as would render it a fraud for Greig, Jones & Wood to fail to comply with their separate and distinct contract of parol acceptance of the bill of exchange. Even though the plaintiff, in selling the goods to Dixon, relied entirely upon the parol acceptance of the bill by Greig, Jones & Wood, he was bound, under the law, to know that such an acceptance was absolutely void. The allegations of the petition did not take the case out of the provisions of the Code section requiring an acceptance of a bill of exchange to be in writing

and signed by the party to be charged therewith, or by some person by him lawfully authorized so to do; consequently there was no error in dismissing the petition upon the demurrer made thereto.

Judgment affirmed.[11]

CHICAGO HEIGHTS LUMBER CO. v. MILLER.

(Supreme Court of Illinois, 1905. 219 Ill. 79, 76 N. E. 52, 109 Am. St. Rep. 314.)

In this cause the Appellate Court for the First District reversed the judgment of the circuit court of Cook county, which was against Miller, without remanding the cause, on the ground that neither the declaration nor the evidence shows a cause of action against the defendant. Miller appealed, and the following accurate statement of the facts in the case was made by the Appellate Court:

"This is an appeal from a judgment of the circuit court of Cook county in favor of appellee (Chicago Heights Lumber Company) and against appellant, (David Miller,) impleaded with Isadore Miller. The declaration avers and the proof shows that on August 10, 1901, William Frink drew an order on Miller Bros. for $682.81 in favor of appellee, in terms as follows:

" 'Chicago Heights, Ill., August 10, 1901.

" 'Mr. Wm. Frink—Miller Job.

" 'In Account with Chicago Heights Lumber Company (Incorporated), Dealer in Lumber, Lath, Shingles, Lime, etc., Corner Sixteenth Street and East End Avenue.

August 10. To mdse..... $711 47
Less material returned..... 28 66

$682 81

" 'Chicago Heights, Ill., August 10, 1901.

" 'Miller Bros.: Please pay to the order of Chicago Heights Lumber Co. six hundred eighty-two 81/100 dollars. Yours truly, Wm. Frink.'

"Frink delivered the order to appellee and appellee presented it to appellant, who, on behalf of Miller Bros., gave appellee the check of Miller Bros. for $400 thereon and promised orally to pay the balance of the order in a few weeks, retaining the order in his possession. Miller Bros., defendants, pleaded the general issue, and subsequently, by leave of court, filed two additional pleas of the statute of frauds, averring that the promises mentioned in the declaration were special

[11]Accord: Pfaff v. Cummings, 67 Mich. 143, 34 N. W. 281 (1887); Weinhauer v. Morrison, 49 Hun, 498, 2 N. Y. Supp. 544 (1888); Anderson v. Jones, 102 Ala. 537, 14 South. 871 (1893). See, also, Izzo v. Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744 (1903); Baltimore R. R. Co. v. Bank, 102 Va. 753, 47 S. E. 837 (1904); Wadhams v. Portland Ry. Co., 37 Wash. 86, 79 Pac. 597 (1905); Van Buskirk v. Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182 (1905); Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064 (1906).

promises to answer for the debt of Frink, and that no memorandum or note thereof in writing, signed by the defendants, or either of them, was made. To these pleas the court sustained a demurrer.

"On the trial the defendants, at the close of plaintiff's case, moved to strike out the plaintiff's evidence, on the ground that the contract came within the statute of frauds. This motion was denied."

The Appellate Court incorporated in its judgment the following finding of facts: "The court finds that the acceptance sued on in this case was an oral acceptance of an order, and that there was no fund in the hands of appellant, the acceptor, out of which to pay the order."

The Chicago Heights Lumber Company obtained a certificate of importance from the Appellate Court, and brings the record to this court by appeal.[12]

SCOTT, J. (after stating the facts as above). Miller Bros. held no fund belonging to Frink and were not indebted to him. If Frink, under these circumstances, had orally requested Miller Bros. to pay his debt to Chicago Heights Lumber Company, and Miller Bros. had verbally promised the company to do so, the promise would have been within the statute of frauds. Does the fact that Frink's request to Miller Bros. to pay his debt was in writing, and that the written request was left with appellee when he paid a part of the debt and verbally agreed to pay the remainder, make a material difference? We think not. In either event Miller Bros. could recover from Frink any amount paid in pursuance of his request. The only difference is that in one instance the evidence of Frink's request lies in parol, while in the other it is in writing. In either case the promise to pay Frink's debt is verbal, and the statute of frauds presents a complete defense.

The only case to which our attention has been called, where, upon the oral acceptance of such an order, the writing itself was left with the acceptor, is that of Louisville, etc., Railway Co. v. Caldwell, 98 Ind. 245. The views there expressed by the court of last resort of the state of Indiana are consonant with the conclusion reached above.

If the written request of Frink be regarded as a bill of exchange, the result would not be different, as the verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another. Browne on Frauds, 174; 2 Rob. Pr. 152; Quin v. Hanford, 1 Hill (N. Y.) 84; Pike v. Irwin, 1 Sandf. (N. Y.) 14; Manley v. Geagan, 105 Mass. 445; Plummer v. Lyman, 49 Me. 229; Wakefield v. Greenhood, 29 Cal. 600; Walton v. Mandeville, 56 Iowa, 597, 9 N. W. 913, 41 Am. Rep. 123.

The judgment of the Appellate Court will be affirmed.[13]

[12] The statement of facts is abridged.

[13] Accord: Barnett v. Lumber Co., 43 W. Va. 441, 27 S. E. 299 (1897).

SECTION 3.—CONSTRUCTIVE ACCEPTANCE

HARVEY v. MARTIN.

(Nisi Prius, before Lord Ellenborough, C. J., 1807. 1 Campb. 425, note.)

Action on bill of exchange, by payee against acceptor. Plaintiff transmitted the bill by post to defendant, the drawee, as soon as he received it, desiring him to accept and hand it over to plaintiff's agent in London, which was the usual mode of dealing between the parties. Plaintiff hearing nothing of his bill from his agent, wrote to defendant, remonstrating with him for the delay. The defendant answered, that he had retained the bill because he had once meant to accept it, which he now declined doing.

Lord ELLENBOROUGH. This is clearly an acceptance. If a bill is left for the express purpose of being accepted and is retained by the drawee, such retention is as much an acceptance as if he had written his name upon the face of it.

JEUNE v. WARD.

(Court of King's Bench, 1818. 1 Barn. & Ald. 653.)

Action against defendant as acceptor of a bill of exchange for £150. drawn by J. G. upon the defendant, in favor of the plaintiff, Jeune. At the trial at the London sittings after Hilary term, before Lord Ellenborough, C. J., it appeared that the defendant, together with another person of the name of Stubbin, was the coexecutor of the will of a Mrs. Leake, under which the drawer Godfrey was entitled to a legacy of £200. on his coming of age. In consequence of this, Godfrey, on the 28th May, 1817, drew the bill on defendant in favor of the plaintiff, as a payment of his bill for goods sold and delivered. The plaintiff, who lived in London, went over on the 29th May to the defendant's house in the country with the bill, and there left it for the purpose of being accepted, but it did not very clearly appear what then passed between the plaintiff and the defendant. At a subsequent period, however, in June, the plaintiff called on Mr. Egerton, the agent for the defendant in London, and introduced himself to him by producing a letter from the defendant, and begged his assistance towards enabling him to obtain payment of the bill from the drawer. He then stated that he had been before with the bill to the defendant, and that the defendant had refused to accept it. Mr. Egerton told him that defendant had done very right in refusing to accept the bill; that Godfrey was, on the 5th July to receive his legacy, and that he recommended

plaintiff then to attend in order to secure the payment of the bill. Accordingly, on the 5th July the plaintiff attended; but, owing to some dispute as to the stamp for the receipt of the legacy, it was not paid on that day, Godfrey then refusing to receive it. It was afterwards paid to him. The plaintiff gave also in evidence a letter of the defendant, in answer to an application for the bill, which stated that having been applied to by the mother of the drawer to give up the bill to them, which, during all this period, had remained in his hands, he had, to avoid further trouble, destroyed it. This case having been proved, Lord Ellenborough, C. J., was of opinion that it amounted in law to an acceptance of the bill by the defendant, and directed the jury to find a verdict for the plaintiff.[14]

Lord ELLENBOROUGH, C. J. I do not recollect that any question was made at the trial as to the correctness of Gould's evidence. His statement was, that the bill in this case was originally left with the defendant for acceptance, and by the defendant's own letter it afterwards appeared that the bill had been destroyed by him. I certainly at that time proceeded on the ground that it was the ordinary and recognized custom of merchants, that when a bill has been left for acceptance, if after a reasonable time has expired (and here a reasonable time had expired) the party omitted to return the bill, he must be considered as having retained it for acceptance. This case goes still further; for here the defendant by his own act puts it wholly out of his power ever to return it, and thereby deprived the holder (there being no power of recreating the bill) of the advantage of being able to prove the handwriting of the drawer. In such a case I have always considered it as a matter of course that such retention and destruction of a bill of exchange was tantamount to an absolute refusal to deliver it, and was therefore, in point of law, an acceptance. But it is contended that no case can be cited, which goes so far as this proposition. The principle laid down by Lord Kenyon in Trimmer v. Oddy, seems to me to govern this case. That decision, I well remember, made a considerable impression on my mind. In the ordinary course of business, when the bill is left with the acceptor, he is to consider whether he will accept it or return it. If he, without saying anything, retains it in his hands, the law then presumes that he has done that for which the bill was left, and which is for the benefit of the party leaving the bill, viz., that he has accepted it. Here, however, it is said that Ward absolutely refused to accept, and it is contended that that circumstance makes the difference. But the period when he did this does not distinctly appear. It might be after a reasonable time had elapsed. Suppose the bill delivered to him on the 29th May; the meeting of Egerton and Jeune was not till the end of June, and the bill was not destroyed till the 9th of July. Then a rea-

[14] The arguments of counsel and the opinions of Abbott and Holroyd, JJ., who concurred with Bayley, J., are omitted.

sonable time might have elapsed before the refusal took place, and a reasonable time did at all events elapse before the destruction. If so, the bill was in point of law then accepted by Ward, and the acceptance could not afterwards be retracted. If indeed the bill had not originally been left for acceptance, the whole case would certainly fall to the ground. But I think it clearly appears from the evidence that it was so left, and the defendant not having in a reasonable time notified his refusal to accept, and having ultimately destroyed the bill, must, as it seems to me, be held liable for it as the acceptor. I think, therefore, that this rule must be discharged.

Bayley, J. I am not prepared to say that the defendant can, in the present case, be considered as the acceptor of this bill. The bill, as it appears from the evidence, was drawn on the 28th May, by Godfrey, on the defendant, and was payable at sight. And on the 29th May the plaintiff, having gone down from London to the defendant's house in the country for that purpose, made an application to him either for payment or acceptance of the bill; but it is not clear for which of these two the application was made. No payment is then made, nor is there any reason to suppose that any acceptance was then given. For some reason, however, which does not appear, the bill was then left in the possession of the defendant, where it remained till the 9th July, the time when it was ultimately destroyed.

Where a bill is, in the usual course of business, left for acceptance, it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. It is not, as it seems to me, the duty of the other person to send it to him, unless, as in the case cited of Harvey v. Martin, there is a usual course of dealing between the particular individuals concerned so to do. Here the party who left the bill does not appear ever to have called or sent for it; and that materially affects the present case. I forbear to say, at present, what would be my judgment on the effect of a destruction of the instrument by the party with whom it was left for acceptance, within the reasonable time during which the other party might expect an acceptance of the bill. If a party says he has destroyed the bill, and that he will not accept it, such destruction might probably subject him to an action of trover for the bill; but I cannot think that it would amount to an acceptance of it. For what is an acceptance? It is an engagement of the one party acceding to the proposition of the other; and it would be very strange indeed if a refusal on his part could in law be deemed an acceding to the proposition. But I give no judgment on this point; for the facts here do not warrant the conclusion that the bill was destroyed by the defendant during the period when the plaintiff could consider it as remaining for acceptance. It appears that at the end of June the plaintiff called on Egerton, and introduced himself to him by producing a letter from the defendant. All the circumstances which then came out show plainly that this whole transaction was an isolated one between the parties, and that there was no course of deal-

ing between them; for the drawer, Godfrey, was entitled to a legacy, and on that ground alone it was that he drew on Ward, the executor. The plaintiff then tells Egerton that the defendant had refused to accept the bill. He does not complain that the bill had been kept by him for an unreasonable time, but applies to Egerton for his assistance in obtaining the money. Egerton tells the plaintiff that Ward has done right in so refusing, and informs him that on the 5th July Godfrey will receive his legacy. On that day all the parties attend, but the money due on the bill does not appear to have been paid. Then after all this, on the 9th July, the defendant writes to the plaintiff that he has destroyed the bill. Now, if that were a wrongful destruction by him, trover would lie against him, and he would in that form of action be subject to pay, not the whole bill as the acceptor of it, but only such damages as the party really sustained by this destruction. For if the drawer were a solvent person he would still be liable, and might pay the bill, either in the whole or in part. If, on the other hand, the destruction was excusable from the circumstances of the case, as if it appeared that the plaintiff had treated the bill as of no importance, and had shown his intention of relying, not on the bill, but on the original consideration, then that would perhaps afford to the defendant an answer even to the action of trover. But at all events, either in the one case or the other, the destruction cannot, as it seems to me, amount to an acceptance of the bill by the defendant. I think, therefore, that this rule should be made absolute.

Rule absolute.

DUNAVAN v. FLYNN.

(Supreme Judicial Court of Massachusetts, Worcester, 1875. 118 Mass. 537.)

Contract to recover $9 on an account annexed for work and labor. The answer of the defendant contained a general denial and alleged payment. Trial in the Central district court of Worcester, the judge of which allowed a bill of exceptions in substance as follows:

At the trial, the defendant offered the following order, signed by the plaintiff, drawn on the defendant, and payable to bearer, and dated Worcester, June 27: "Please to pay the bearer 9 dollars due to me for work (this woman is my boarding boss), and oblige, yours," etc. Below were written the words, "Acted June 30th, 1874," over the defendant's signature. It appeared in evidence, and was not contradicted, that the bearer of the order was Mrs. Cronan; that the order was delivered to her by the plaintiff; that upon the receipt of the order Mrs. Cronan presented it to the defendant, and left the order in the defendant's possession; that the defendant said that he could not pay it then, but that if she could give him three or four days he would pay it; that she gave the defendant the three or four days, and the order was left in the defendant's possession, and there remains, and

she never called upon the defendant for payment afterwards. The defendant testified substantially the same, and, upon cross-examination, testified that after the departure of Mrs. Cronan he wrote the words: "Acted June 30th, 1874. J. W. Flynn"—upon the face of he order; that he wrote that to make him pay it to Mrs. Cronan; that he intended the words written on the face of the order for an acceptance in writing. On cross-examination, the defendant, in answer to the plaintiff's counsel, said that he did not think his liability to pay the order commenced until after he had written his name on the order.

The judge, against the objection of the defendant, instructed the jury: "If the defendant did not verbally, or in writing, accept the order when presented, but, the order being left with him, he afterwards wrote the acceptance upon it, but did not after such acceptance inform either the drawer or Mrs. Cronan of the fact, but retained the order in his custody, this would not operate as payment of the plaintiff's claim against him."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

GRAY, C. J. An acceptance of a bill of exchange, or draft for the payment of money, may be oral, or may be implied from acts such as detention for a long time, contrary to the usage of the parties and under such circumstances as to give credit to the bill. Storer v. Logan, 9 Mass. 55, 60; Pierce v. Kittredge, 115 Mass. 374; Hough v. Loring, 24 Pick. 254, 257, 3 Kent, Com. (12th Ed.) 85.

But in the case before us the jury have found that there was no oral acceptance, and were warranted in so doing; for although the testimony of the defendant and of the holder of the bill, tending to prove such acceptance, is stated in the bill of exceptions not to have been contradicted, the jury were not obliged to believe it. Allowing the utmost weight to all the evidence, there was nothing to show that the detention of the bill by the defendant was contrary to the usual course of dealing between the parties (for it did not appear that they had had any other dealings), or that the defendant was under any obligation to return the bill to the holder, or detained it for any other reason except that she did not call for it. Under these circumstances, it was rightly held that the mere writing of the acceptance upon the bill, not communicated to the drawer or holder, and the detention of the bill in the defendant's custody, did not bind him, or operate as a payment of his debt to the drawer.

Exceptions overruled.[15]

[15] Accord: Cox v. Troy, 5 Barn. & Ald. 474 (1822), when his acceptance was erased by drawee before delivery to the holder; Freund v. Bank, 3 Hun (N. Y.) 689 (1875). But see Wilde v. Sheridan, 21 L. J. Q. B. 260 (1852). In the principal case, the statement of facts is abridged.

DICKINSON v. MARSH.

(Kansas City Court of Appeals, Missouri, 1894. 57 Mo. App. 566.)

GILL, J. This action is founded on the following bill of exchange alleged to have been accepted by the defendant:

"November 26th, 1892.

"Mr. Ed. Marsh: Please pay to J. E. Dickinson eighty dollars and thirty cents. Fred Nichols."

Plaintiff offered certain evidence tending to prove that Nichols, the drawer, owed the plaintiff, and that defendant, Marsh, prior to the date of the order, informed plaintiff that if he (plaintiff) would procure an order from said Nichols on him (Marsh) for said sum, he (Marsh) would pay the same. This proffered evidence was, on objection of the defendant, excluded as immaterial. Plaintiff also offered testimony tending to prove that, on the day he received said order from Nichols, he took the same to the defendant, who received said order, remarking that, "It is all right," and kept and retained same until date of trial; that defendant, at the time he received the order, promised orally to pay it. To the introduction of this evidence defendant's counsel objected on the ground that, since this is a suit on an alleged accepted order or bill of exchange, proof of such acceptance must be in writing and could not be otherwise established. The court sustained the objection. Thereupon plaintiff took a nonsuit with leave, and brought the case here by appeal.

The action of the trial court is approved, and its judgment will be affirmed. The statute provides: "No person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent." Rev. St. 1889, § 719. There is no pretense that the defendant ever so accepted this bill of exchange. He cannot, therefore, be held thereon.

It is, however, claimed that there was a constructive acceptance under the provisions of a section 724 of the same statute. It reads: "Every person upon whom a bill of exchange may be drawn, and to whom the same shall be delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such period as the holder may allow, to return the bill, accepted or nonaccepted, to the holder, shall be deemed to have accepted the same." The facts sought to be proved, and as giving color to this position, are that plaintiff delivered the written order or bill of exchange to the defendant on its date and that with the consent of plaintiff, and under a promise by defendant to pay, he (defendant) continued to hold the same till the trial of the cause. These facts, it is urged, amount to a refusal to return the bill after delivery, and such as will be deemed an acceptance under the foregoing section.

We must hold this point against the plaintiff. The mere receipt of the bill of exchange and holding the same, without more, does not,

in our opinion, constitute the refusal to return that will be deemed a constructive acceptance by force of the statute above referred to. Rousch v. Duff, 35 Mo. 512; Matteson v. Moulton, 11 Hun (N. Y.) 268, and 79 N. Y. 627. In the case last cited the New York court so construed a statute of which ours is an exact copy. The court there said: "The refusal mentioned in the statute, as it seems to us, refers to something of a tortious character implying an unauthorized conversion of the bill by the drawee." It cannot be called a tortious or wrongful holding of the bill when, as here, the plaintiff voluntarily left it with the drawee and never demanded its return. Lockhart v. Moss, 53 Mo. App. 633, does not support plaintiff's contention. Indeed, that decision is in harmony with the cases before cited, since it was there admitted that return of the bill was demanded.

We may further say, too, in answer to the claim made on account of the defendant's alleged promise to pay the order, using the language of the New York case, that "the attempt to charge the defendant with the payment of the bill upon the ground of a promise is simply an attempt to charge the defendant with a liability on the bill upon a parol acceptance. If an action can be maintained under such circumstances, the provisions of section 719 of the statute before referred to would be rendered wholly nugatory." See, also, Rousch v. Duff, supra.

Judgment affirmed. All concur.[16]

WESTBERG v. CHICAGO LUMBER & COAL CO.

(Supreme Court of Wisconsin, 1903. 117 Wis. 589, 94 N. W. 572.)

Action upon a [non]negotiable bill of exchange drawn upon the defendant in favor of the plaintiff by the Lien-Neally Lumber Company for $585, alleged to have been accepted by the defendant. The answer was a general denial. The evidence disclosed that the Lien-Neally Lumber Company, sawmill owners, had purchased from the plaintiff certain logs or stumpage amounting to $585; that they had sold product of their mill, including that of these logs, to the defendant, and were in the habit of making orders and drafts upon the latter for money to pay their various bills. About April 21st, upon plaintiff's application for payment, they made out an order upon the defendant substantially as follows: "To Chicago Lumber & Coal Co.: Please pay to John Westberg five hundred eighty-five (585) dollars for logs delivered at Bibon as per contract. [Signed] Lien-Neally Lumber Co."

[16] Accord: Matteson v. Moulton, 11 Hun, 268 (1877), affirmed 79 N. Y. 627 (1880); St. Louis & S. W. Ry. v. James, 78 Ark. 490, 95 S. W. 804 (1906). Contra: State Bank v. Weiss, 46 Misc. Rep. 93, 91 N. Y. Supp. 276 (1904); Wisner v. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266 (1908).

In the principal case, arguments of counsel are omitted.

They had plaintiff write his name on the back of it, and then Mr. Lien mailed that order, in connection with other orders and time-checks aggregating some $2,000, to the defendant, accompanied by a letter the contents of which are not disclosed. The defendant's representative denied any memory of the order or draft in favor of the plaintiff. It was proved, however, that he sent to the Lien-Neally Company the money for the other orders inclosed in the same letter. Plaintiff never heard from the defendant, but made repeated applications to the Lien-Neally Company for payment, and was put off from time to time by promises, until finally they refused to pay, saying he must look to the defendant. At that time the defendant had paid drafts of that company to more than the amount of the indebtedness to it, and refused to pay this. The plaintiff's draft never was returned to him.

On the trial, a special verdict being requested, the court submitted but one question, namely, whether the defendant received this draft on or before April 23d, which was answered in the affirmative, and thereupon the court found that the plaintiff delivered that order for acceptance on or before April 23d; that it was received by the defendant, and was by it destroyed, and that the defendant is indebted to the plaintiff in the amount thereof, with interest; the last conclusion being predicated upon the theory that the retention and destruction of the order constituted an acceptance. From judgment in accordance with that finding the defendant appeals.

DODGE, J. (after stating the facts as above). Rendition of judgment in favor of plaintiff in this case can be justified only on one of two theories—either that in law an implication of acceptance results from the mere physical receipt of a bill of exchange by the drawee, followed by silence, or that all other facts essential to such implication were undisputed, or were supported by inference from undisputed facts so clear and unavoidable that no reasonable mind could draw any other. Appellant had the right to have each controverted question of fact decided by the jury.

Upon the question of law as to when implied or constructive acceptance takes place, the authorities are reasonably clear and approximately unanimous. Upon delivery for acceptance, the drawee is not bound to act at once. He has a right to a reasonable time—usually 24 hours—to ascertain the state of accounts between himself and the drawer, and until expiration of that time the holder has no right to demand an answer, nor, without categorical answer, to deem the bill either accepted or dishonored; not accepted, because of the right of drawee to consider before he binds himself; not dishonored, because both drawer and drawee have the right that their paper be not discredited during such period of investigation. After the expiration of that reasonable time the holder has a right to know whether the drawee assumes liability to him by accepting, and, if not, he has a right to return of the document, so that he may protest or otherwise proceed to preserve his

rights against the drawer. The consensus of authority is, however, that the duty rests on the holder to demand either acceptance or return of the bill, and that mere inaction on the part of the drawee has no effect. After the expiration of this time for investigation, the drawee may, by retention of the bill, accompanied by other circumstances, become bound as an acceptor; not, however, by mere retention.

There seem to be two phases of conduct recognized by the authorities as charging the drawee—one purely contractual, as where the retention is accompanied by such custom, promise, or notification as to warrant the holder, to the knowledge of the drawee, in understanding that the retention declares acceptance; the other, where the conduct of the drawee is substantially tortious, and amounts to a conversion of the bill. This is the phase of conduct which our negotiable instrument statute (section 1680k, c. 356, p. 735, Laws of 1899) has undertaken to define and limit as refusal (not mere neglect) to return the bill, or destruction of it; reiterating the common-law rule that mere retention of the bill is not acceptance. Overman v. Hoboken Bank, 31 N. J. Law, 563; McEowen & Co. v. Scott, 49 Vt. 376; Colo. Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Dickinson v. Marsh, 57 Mo. App. 566; Dunavan v. Flynn, 118 Mass. 537; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; Gates v. Eno, 4 Hun (N. Y.) 96; Matteson v. Moulton, 11 Hun (N. Y.) 268, affirmed 79 N. Y. 627; Hall v. Steel, 68 Ill. 231; First Nat. Bank v. McMichael, 106 Pa. 460, 51 Am. Rep. 529; Koch v. Howell, 6 Watts & S. (Pa.) 350; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Boyce v. Edwards, 4 Pet. 111, 7 L. Ed. 799; Bank of the Republic v. Millard, 10 Wall. 152, 19 L. Ed. 897; 1 Daniel, Neg. Inst. §§ 499, 500.

The doctrine of constructive acceptance is based on the general principles of estoppel. If the conduct of the drawee will prejudice the existing rights of the holder, unless it means acceptance, and the drawee has knowledge of such fact, he is estopped to deny the only purpose which could render his conduct innocuous; namely, acceptance of the bill. This underlying principle suggests the reasons for many of the limitations upon the implication of acceptance from conduct; as, for example, that such implication arises only when the bill is presented for acceptance, and that no one but the holder (payee or indorsee) can make such technical presentment. 2 Randolph, Com. Paper, §§ 568, 572; 1 Daniel, Neg. Inst. §§ 455, 1681, 1682; Neg. Inst. Law Wis. 1899, p. 738, c. 356. Only when the drawee knows that acceptance is expected would he suppose that his conduct can lead to a belief that he does accept. Only when the presentment is by the holder, whose conduct and rights must be affected by acceptance or refusal, is the drawee charged by the strict rules of the law merchant with notice that his conduct may so injuriously affect the person delivering the bill to him.

In the light of these rules of law it is at once apparent that the verdict alone does not present sufficient facts to charge defendant with constructive acceptance. Not only must he have received the bill, as the jury found, but he must knowingly have received it from the payee or his authorized agent, and for acceptance; and even then there must have been something more than mere retention—either destruction or refusal to return to the holder, if within the negotiable instrument statute, or some circumstances, contractual or tortious, to arouse estoppel, if, by reason of nonnegotiability, this instrument is governed only by the common law. We must, therefore, turn to the evidence to ascertain whether all these necessary additional facts were established beyond controversy. True, the court filed so-called findings of fact declaring some of them to exist, but, as appellant claimed that the fact of acceptance should be submitted to the jury, it did not consent that the court might assume to decide either the facts or the inferences therefrom, unless free from controversy.

The only evidence of the manner and purpose of the sending of this draft is that the drawer sent it in the same inclosure with numerous other documents similar in form, with which plaintiff had no connection. The contents of the accompanying letter are not disclosed, but it is reasonably clear that the other orders were not sent for acceptance on behalf of the payees therein, but merely as vouchers between the drawer and drawee; for, evidently, as expected, the latter sent money in response thereto direct to the drawer. The plaintiff's order or draft, having no time of payment expressed, was payable on demand, and did not need to be presented for acceptance, and therefore did not of itself suggest any demand for such action. 1 Randolph, Com. Paper, § 119; 1 Daniel, Neg. Inst. § 454. The witness Lien testified, "I mailed it in behalf of the Lien-Neally Lumber Co." Plaintiff said: "I didn't mail it myself. Lien said he would mail it. I left it to him." And again: "I was expecting money on this draft. Mr. Lien said he would send the money down to me."

This is the substance of all the evidence as to the circumstances under which this paper came to the hands of the defendant. We need not say more than that, instead of conclusively establishing, as the court found, that "the plaintiff delivered the said order for acceptance to the defendant," it quite as much tends to show the contrary, namely, that the drawer, with consent of plaintiff, sent it as a voucher for money expected to be remitted to that corporation, and by it paid over to plaintiff. There is no particle of evidence to establish existence of any communication or circumstance which could suggest to defendant that plaintiff sent it or authorized its sending, that any acceptance was demanded or expected, or that plaintiff's relations with the drawer would be affected by silence.

If, however, both of these questions could be answered in the affirmative, there would still remain the question of fact whether defend-

ant's conduct was such as to warrant inference or implication of acceptance. There is no direct evidence of anything except long-continued retention of the draft, and no evidence that any demand was ever made, either for decision as to acceptance or for return. The court sought to meet this question by its finding that defendant destroyed the draft. Of this there is no direct proof, the sole evidence on the subject being that of defendant's agent that he had no recollection about it, and did not know whether or not it was among papers in defendant's Chicago office. Whether this might have warranted the jury in so doing, it certainly was not so wholly inconsistent with any other as to require the court to raise the inference of destruction as matter of law.

Hence we must conclude that there were at least three questions of fact on which the jury were not permitted to decide, as to which the evidence and inferences were not beyond controversy, at least in favor of plaintiff. Whether there was any evidence to support such a decision we need not decide, for there was no motion, after verdict, for judgment in defendant's favor. A new trial must, therefore, be directed.

As a guide to the court and parties upon such new trial it seems important that we declare whether the instrument in suit is within the purview and control of our negotiable instrument law, above cited. Whether such paper continues to be a bill of exchange in pursuance of our earlier decisions (Mehlberg v. Tisher, 24 Wis. 607; Schierl v. Baumel, 75 Wis. 69, 43 N. W. 724), it certainly is not a negotiable bill within the definition of section 1680, Rev. St. 1898, as amended by chapter 356, p. 733, of the Laws of 1899, which requires that such an instrument shall be payable to order or bearer. It seems clear from the title that the codifying law of 1899 is intended to regulate only negotiable instruments. Selover, Neg. Inst. Laws, § 2. It therefore does not affect or control the rights of the parties upon this paper.

Judgment reversed, and cause remanded for a new trial.

CHAPTER III

DELIVERY

FEARING v. CLARK.

(Supreme Judicial Court of Massachusetts. Hampden, 1860. 16 Gray, 74, 77 Am. Dec. 394.)

Action of contract on a promissory note for $600, made by the defendant, dated July 4, 1857, and payable in one year after date to the order of one Joseph Lambrite, and by him indorsed. The defendant in his answer denied the making and indorsement of the note declared on, but admitted that he signed such a note, and averred that he put it into the hands of third parties to be delivered to Lambrite, on the happening of contingencies which never did happen, and that neither the defendant nor those parties, nor any one else, by his authority or consent, ever delivered the writing to Lambrite or to any other person as the defendant's promissory note.

At the trial in the superior court, the plaintiff proved the signatures of the maker and indorser; and there was evidence that, on the 6th of July, 1857, the note was in Lambert's possession, and was indorsed and delivered by him to the plaintiff as collateral security for the payment in six months of $2,000, of which $900 was still due from Lambrite to the plaintiff at the time of the trial, and that the plaintiff took the note without any knowledge of the circumstances under which it had been given.

Rockwell, J., allowed the defendant to introduce evidence of the facts alleged in his answer, against the objection of the plaintiff that they would constitute no defense to the action unless proved to have been known to the plaintiff when he took the note, and instructed the jury "that if they should find that the writing copied in the declaration was never delivered by the defendant, or any person authorized by him so to deliver it, to the payee, or to any person for his use, but that he obtained possession of it without the assent or knowledge of or authority from the defendant, and, having obtained such possession without right or authority, put his name upon the back of it, and delivered it to the plaintiff, then and in that case it never became the negotiable note of the defendant, and the defendant was entitled to their verdict." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

Bigelow, C. J. The defendant proved no facts at the trial which constituted a valid defense to the note declared on as against the plaintiff, who is a bona fide holder for value without notice. The rule is

well settled that, when a note is transferred by a party to whom it is intrusted without authority or fraudulently, it will be valid as against the maker in the hands of a holder who takes it bona fide without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case, the maker or indorser who places it in the hands of another, for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and cannot refuse to pay it to any bona fide holder into whose hands it may come. Chit. Bills (10th Ed.) 198; Sweetser v. French, 2 Cush. 309, 48 Am. Dec. 666. It is undoubtedly true that, as between the original parties to a note or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a bona fide holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practiced on him, or by a voluntary violation of the trust reposed in him, must be deemed in law, as against a bona fide holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it bona fide without notice. It therefore makes the consequences, which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception, or mistake of those persons to whom they are intrusted by the makers to fall on those who enabled them to hold themselves out as owners of the paper jure dispondendi, and not on innocent holders who have taken it for value without notice.

Exceptions sustained.[1]

[1] Contra: Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1 (1875). Accord: Borough of Montvale v. Bank, 74 N. J. Law, 464, 67 Atl. 67 (1907), an action of replevin brought by the borough to recover two of its negotiable bonds, which after their authorization and formal completion were left in the custody of the mayor until the further order of the borough, and were by him negotiated to the plaintiff who took as a holder in due course. Gummere, C. J., said: "Applying to the borough the conclusive presumption which this last-cited section (15) of the statute prescribed for the protection of a holder in due course, it must be held to have made a valid de-

BURSON v. HUNTINGTON.

(Supreme Court of Michigan, 1870. 21 Mich. 415, 4 Am. Rep. 497.)

This cause was brought into the circuit court for the county of Kalamazoo by appeal from the judgment of a justice of the peace, in an action in which Walter S. Huntington was plaintiff and John W. Burson defendant. The justice's transcript states that the plaintiff declared verbally on the common counts in assumpsit and upon a promissory note, which was filed at the time of declaring, and of which the following is a copy, viz.:

"Schoolcraft, Mich., April 12, 1866.

"Ninety days from date, for value received, I promise to pay A. N. Goldwood, or order, one hundred and twelve dollars, and fifty cents, with interest. John W. Burson."

Indorsed on the back: "A. N. Goldwood."

The defendant filed an affidavit denying the delivery of the note. Judgment for plaintiff and the defendant appealed.[2]

CHRISTIANCY, J. * * * But this note was indorsed by Goldwood, the payee, to the plaintiff, before maturity, for a valuable consideration, and, as plaintiff claims, in good faith and without notice of a want of delivery or of consideration, or any other circumstances tending to invalidate it in the hands of Goldwood; and his evidence tended to show this, though there was evidence of some circumstances tending to show that he had notice of the circumstances under which the paper had been obtained.

There was also evidence on the part of the defendant, strongly tending to show: That the note never was delivered by the defendant, but that Goldwood, to whose order it was drawn, was endeavoring to sell to the defendant a patent right or the right of certain territory under it, and that the parties had so far progressed towards the making of an arrangement to this end, that it was understood and verbally agreed that Goldwood was to give him a deed of certain territory, upon defendant's executing to him a note for the amount, with some other person signing it as surety. That the parties being in the defendant's house, and defendant's sister being present, Goldwood wrote this note, and defendant signed it; but as a surety was to be obtained, he laid the note on the table and went out to find his uncle for that purpose, telling Goldwood, as he went out, not to touch it till he came back;

livery of these bonds, so far as the defendant bank is concerned, and the latter is therefore entitled to retain possession of them as outstanding obligations of the municipality. Our determination that the negotiable instruments act applies to municipal bonds, as well as to bills of exchange, promissory notes, and checks, makes unnecessary a consideration of the interesting question argued by counsel of the respective rights of the plaintiff and defendant under the law merchant as it existed prior to the enactment of that statute."

[2] The statement of facts is abridged, and the arguments of counsel and part of the opinion are omitted.

but that while defendant was gone, Goldwood picked up the paper and started out doors with it. That defendant's sister then told him to let the note be on the table till defendant should come back, to which Goldwood replied he was going to have the note, and went off with it, without giving any deed of territory or anything else for it. That the note, at this time, was not stamped, and defendant never stamped or authorized it to be stamped; that some four days after, Goldwood wrote to defendant requesting him to come immediately to Kalamazoo "and sign stamp on the note," and saying if defendant was not there by Tuesday evening "I shall consider that you refuse your signature, and shall act accordingly." The evidence also tended to show that defendant called upon Goldwood about that time, while the latter had the note, and demanded it, accusing him of stealing it, to which Goldwood replied, "Never mind, we can fix that up," and said he was ready to do as he had agreed, and wanted defendant to get another signer, and he would give him a deed of territory; but defendant said he did not want the deed, but wanted the note. Goldwood refused to return the note, or to give a deed till he got another signer.

These facts, if found by the jury, would show, not only that the note was never delivered to the payee, and that it therefore never had a legal existence as a note between the original parties, but that there was yet no completed or binding agreement of any kind, and was not to be until defendant should choose to get a surety on the note, and the payee should give him a deed of territory. Until thus completed, the defendant had a right to retract.

As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. See Edwards on B. and N. 175, and authorities cited, and 1 Pars. on B. and N., 48 and 49, and cases cited. And see Thomas v. Watkins, 16 Wis. 549; Mahon v. Sawyer, 18 Ind. 73; Carter v. McClintock, 29 Mo. 464.

Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect from the delivery and not from the date. 1 Pars. ubi supra. This is certainly true as between the original parties.

But negotiable paper differs from ordinary written contracts in this respect: That even a wrongful holder, between whom and the maker or indorser the note or indorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker.

When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a bona fide holder for value, the latter

may recover against the maker, and all indorsers on the paper when in the hands of the loser; and the loser must sustain the loss. In such a case there was a complete legal instrument. The maker is clearly liable to pay it to some one; and the question is only to whom.

But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note.

But it is urged that this case falls within the general principle, which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it. This is a principle of manifest justice when confined within its proper limits. But the principle, as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged, can properly be said to have "enabled the third person to occasion the loss," within the meaning of the rule. If I leave my horse in the stable, or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality. And upon examination it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss, and that the party has been held responsible for the acts of those in whom he had trusted upon grounds analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions, by which the rights of others may be affected, has, as to the persons to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or indicia of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obli-

gations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is thus intrusted violate the confidence reposed in him, and put the note into circulation, this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such bona fide holder; or if the note be sent by mail, and get into the wrong hands, as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect, if the note or indorsement were signed in blank, if the maker or indorser part with the possession, or authorize a clerk or agent to do so, and it is done. 1 Parsons on Bills and Notes, 109 to 114, and cases cited, especially Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206, which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerks as to the delivery.

And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must, doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confidence in another, and by putting the papers into his hands has enabled him to appear as the owner, and to deceive others. Cases of this kind are numerous; but they have no bearing upon the wrongful taking from the maker, when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books, and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud, when it is laid down as a general rule, that it is no defense for a maker, as against a bona fide holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

We do not assert that the general rule we are discussing—that

"where one of two innocent parties must suffer," etc.—must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation, might justly estop him from setting up nondelivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken.

Upon this principle the case of Ingham v. Primrose, 7 C. B. (N. S.) 82, was decided, where the acceptor tore the bill into halves (with the intention of canceling it) and threw it into the street, and the drawer picked them up in his presence, and afterwards pasted the two pieces together and put them into circulation. See, also, by analogy, Foster v. Mackinnon, Law Rep. 4 Com. B. 704.

But the case before us is one of a very different character. No actual delivery by the maker to any one for any purpose.

The evidence tends to show that when he left the room in his own house, the note being on the table, and his sister remaining there, he did not confide it to the custody of the payee, but told him not to take it, and no final agreement between them had yet been made, and no consideration given. Under such circumstances he can no more be said to have trusted it to the payee's custody or confidence than that he trusted his spoons or other household goods to his custody or confidence; and there was no more apparent reason to suppose he would take and carry off the one than the other.

The maker, therefore, cannot be held responsible for any negligence. There was nothing to prove negligence, unless he was bound to suspect, and treat as a knave, a thief, or a criminal, the man who came to his house apparently on business, because he afterwards proved himself to be such. This, we think, would be preposterous.

We, therefore, see no ground upon which the defendant could be held liable on a note thus obtained, even to a bona fide holder for value. He was guilty of no more negligence than the plaintiff who took the paper, and the plaintiff shows no rights or equities superior to those of the defendant.

Such, we think, must be the result upon principle. We have carefully examined the cases, English and American, and are satisfied there is no adjudged case in the English courts, so far as their reports have reached us, which would warrant a recovery in the present case. Some dicta may be found, the general language of which might sustain the liability of the maker, such as that of Baron Alderson in Marston v. Allen, 8 M. & W. 494, cited by Duer, J., in Gould v. Segee, 5 Duer (N. Y.) 260, and that used by Williams, J., in Ingham v. Primrose, 7 C. B. (N. S.) 82. But a reference to the cases will show that no such question was involved, and that these remarks were wholly outside of the case.

On the other hand, Hall v. Wilson, 16 Barb. (N. Y.) 548, 555, and 556, contains a dictum fully sustaining the views we have taken.

There are, however, two recent American cases, where the note or indorsement was obtained without delivery, under circumstances quite as wrongful as those in the present case, in one of which the maker, and in the other the indorser, was held liable to a bona fide holder for value: Shipley v. Carroll et al., 45 Ill. 285 (case of maker), and Gould v. Segee, 5 Duer (N. Y.) 266. But in neither of these cases can we discover that the court discussed or considered the real principle involved; and we have been unable to discover anything in the cases cited by the court to warrant the decision. It is possible that the case in Illinois may depend somewhat upon their statute, and the note being made as a mere matter of amusement, and the making not being justified by any legitimate pending business, the maker might perhaps justly be held responsible for a higher degree of diligence, and therefore more justly chargeable with negligence under the particular circumstances, than the maker in the present case.

There is another case (Worcester Co. Bank v. Dorchester & Milton Bank, 10 Cush. [Mass.] 488, 57 Am. Dec. 120), where bank bills were stolen from the vault of the bank, which though signed and ready for use, had never been yet issued, and on which a bona fide holder for value was held entitled to recover. This, we are inclined to think, was correct. The court intimated a doubt whether the same rule should apply to bank bills as to ordinary promissory notes, and as to the latter failed to make any distinction between the question of delivery and questions affecting the rights of the parties upon notes which have become effectual by delivery. But we think bank bills which circulate universally as cash, passing from hand to hand perhaps a hundred times a day, without such inquiries as are usual in the cases of ordinary promissory notes of individuals, stand upon quite different grounds. And, considering the temptations to burglars and robbers, where large masses of bank bills are known to be kept, and the much greater facility of passing them off to innocent parties, without detection or identification of the bills or the parties, and that the special business of banks is dealing in, and holding the custody of, money and bank bills, it is not unreasonable to hold them to a much higher degree of care, and to make them absolutely responsible for their safe-keeping. We do not therefore regard this case as having any material bearing upon the case before us. * * *

Judgment reversed.

CLARKE v. JOHNSON.

(Supreme Court of Illinois, 1870. 54 Ill. 296.)

WALKER, J. This was an action of assumpsit on a promissory note executed by defendant to one Bush, on the 28th of October, 1869, for $108, due at one day, with 10 per cent. per annum interest. On the

back of the note was indorsed an assignment, in the usual form, but without date, to plaintiff. A plea, among others, was filed averring that the making of the note was obtained by fraud and circumvention. A trial was had, resulting in a verdict and judgment in favor of defendant, and plaintiff has brought the record to this court, and assigns various errors.

On the trial, appellee testified that he signed the note as it appeared at the trial; that it had not been altered after it was signed. He states that Bush came to his house at the date of the note, and proposed to sell him a plowing machine, and that, being in doubt as to the truth of Bush's representations, and Bush having proposed to go to the railroad station and telegraph to the manufacturers for the purpose of satisfying appellee, he was about to insert a condition in the note that would insure the delivery of the plows or render it void, when Bush snatched the note from appellee and ran off with it; that he had never seen Bush afterwards, and was, at the time, too unwell to prosecute him; that he intended to insert a condition in the note before giving it to Bush, and knew nothing of Clarke until the note was assigned to him. He states he never received the plows or machinery, and, on writing to the manufacturers, they denied knowing Bush and disclaimed his agency.

The court thereupon gave this instruction: "The plaintiff is entitled to recover on the note in question if the jury are satisfied that the defendant executed the note in question. It is no defense to an action on such note that the note was obtained in bad faith, or that it was surreptitiously obtained by the payee, or even forcibly, if it was assigned before due. The defendant denies, by his pleas, the making and delivery of the note, as his note, for a note cannot be said to be executed until it is delivered. The making is not complete without a delivery. If the jury shall believe, from the evidence, that defendant never executed this note—that is, that there was no legal and valid execution of the note on his part, by a delivery of it, as well as signing—it was not his note, and the defendant will be entitled to a verdict."

This instruction manifestly misled the jury in arriving at their verdict. It asserts that the note was not executed until it was delivered, and that, if appellee did not deliver it, there was no legal and valid execution of the note, that would bind appellee for its payment, and he was entitled to a verdict. This is, no doubt, true as between the parties, but not as to an innocent purchaser before maturity. And when an assignment is found on a note, without date, the presumption is that it was indorsed at the date of its execution.

In the case of Shipley v. Carroll, 45 Ill. 285, the plea averred that the note was written and signed by the maker, simply and solely as a matter of amusement, without any design of delivering it to the payee, and that the payee feloniously stole the note from the maker, and that he never was the legal holder or owner of the note. In that case, the note had been assigned before maturity, and on demurrer it was

held that the plea did not, as against the assignee before it fell due, present a defense to its collection. That case was certainly as strong as this, and, being similar in principle, it must control and is decisive of the case at bar.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

DOUGLASS v. MATTING.

(Supreme Court of Iowa, 1870. 29 Iowa, 498, 4 Am. Rep. 238.)

Action by an indorsee upon a promissory note. A count in the answer sets up a defense in the following words: "And this defendant, for a further answer to the petition of the plaintiff, says: That on or about the date of the alleged execution of the said alleged promissory note, as set forth in said petition, a stranger called on this defendant, representing that he, the said stranger, was the agent of one O. M. Pond, and, as such agent, was appointing other agents and establishing agencies, for and in behalf of the said O. M. Pond, for the sale of a certain patent seeder and cultivator, which he, the said stranger, alleged was of great value and meeting with ready sale, and that a great amount of money could be made by accepting the appointment as such agent, and that as the agent of said Pond he was desirous of obtaining the consent of this defendant to act as agent in and for the sale of said machines; that no money or other pecuniary or valuable thing was or would be required, and that all that would be necessary for this defendant to do in the premises would be to sign a contract in duplicate, one of which was to be signed and kept by this defendant, and the other by the said stranger, as the agent for the said Pond, said contract being nothing more than a statement that he, this defendant, agreed to act as the agent of the said Pond in the sale of said machines, and agreed to pay over the profits on the first four sold as a consideration for the appointment of such agent; and that he then and there agreed to sign such a contract, and no other, and if he signed the note sued on, he signed the same believing and relying upon the representations of the said stranger that the same was nothing but a contract of the character as above stated, and not knowing that the same was a promissory note. Wherefore this defendant says that he never signed and executed the said note sued upon."

The answer contains no averment that the defense, above stated, was known to the plaintiff when the note was indorsed to him. To the foregoing count of the answer the plaintiff demurred. The demurrer was overruled, and, plaintiff standing upon his demurrer, judgment was rendered for defendant, from which plaintiff appeals to this court.

BECK, J. It will be observed that the answer substantially admits the execution of the note, but, as a defense, alleged that defendant's signature was obtained thereto by fraudulent misrepresentations of the agent of the payee; that defendant, relying upon the representations of the agent, to the effect that the paper was a contract of the character described, signed his name thereto. Of these facts it is not averred that plaintiff had notice when the note was indorsed to him. We are required to determine whether the answer presents a sufficient defense. It is conceded that, if the transaction of the agent of the payee in procuring the signature of defendant amounted to less than a forgery, the defense is not sufficient, as against a bona fide holder, receiving it for value before due. Plaintiff must be regarded as such a holder under the pleadings. We must determine, then, whether the note, according to the averments of the answer, is in law a forgery. In our opinion, upon principle, it is not. The defendant intrusted the one with whom he was dealing with the preparation of the instrument. The instrument as prepared was not what defendant had agreed to sign, but was voluntarily executed by him. The act of the agent was a fraud whereby defendant was induced to make the note, and not the false making of it, which is necessary to constitute forgery. There are authorities that hold differently, but this view appears to us in accord with principle and required by the wants of the commerce of the country, which deals so extensively in negotiable paper. Neither is it unsupported by authorities. See Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Commonwealth v. Sankey, 22 Pa. 390, 60 Am. Dec. 91.

As between the bona fide holder, receiving the paper before due for value, and the maker, the equities are all on the side of the first. The maker puts his genuine signature to a note appearing upon its face fair and regular. In the regular course of business it comes into the hands of an innocent party, who has paid a valuable consideration for it and has no notice of any infirmities or defenses attaching to the paper. Now it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing with a stranger, he signed the instrument without reading it or attempting to ascertain its true contents. The law will favor, as between the holder and maker in such a case, the more innocent and diligent. The maker had it in his power to protect himself from the fraud, but failed to do so. When the consequences of his act are about to be visited upon him, he seeks to make another bear it, on the ground that he was defrauded through his own gross negligence. He can certainly claim protection neither on the ground of his innocence or diligence.

The rule contended for by appellee would tend to destroy all confidence in commercial paper. It is better that defendant, and others who so carelessly affix their names to paper, the contents of which

are unknown to them, should suffer from the fraud which their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled.

In our opinion the demurrer of plaintiff to the answer should have been sustained.

Reversed.

WALKER v. EBERT.

(Supreme Court of Wisconsin, 1871. 29 Wis. 194, 9 Am. Rep. 548.)

Action on a promissory note, by a holder, who claims to have purchased it for full value, before maturity. The answer alleges that the defendant is a German by birth and education, and unable to read and write the English language; that, on the day of the date of the supposed note, the payees thereof, by their duly authorized agent, falsely and fraudulently represented to him, with intent to swindle, cheat and defraud him, that they would appoint him sole agent for his town of a certain patented machine, for ten years, and would deliver to him one of said machines free of cost, except freight, and he should receive 50 per cent. of all profits on his sales; and he accepted such agency upon those terms, and that the payees, by their said agent, then presented to him to sign, in duplicate, an instrument, partly written and partly printed, which he was unable to read, and which such agent falsely and fraudulently represented to be simply a contract embracing the terms orally agreed upon between them, and he, believing it to be so, signed his name to it in duplicate; that such payees never delivered the machine promised, and never intended to do so, and defendant never sold any.

On the trial, the defendant offered to prove by his own testimony the facts so alleged by him relative to his signature to the note in suit, and that he never delivered it to any one, which evidence was objected to by the plaintiff, and ruled out by the court; and, there being no further evidence, the court directed a verdict for the plaintiff. A motion for a new trial was overruled and judgment entered on such verdict, from which the defendant appeals.

DIXON, C. J. The defendant, having properly alleged the same facts in his answer, offered evidence, and proposed to prove by himself as a witness on the stand, that at the time he signed the supposed note in suit he was unable to read or write the English language; that, when he signed the same, it was represented to him as, and he believed it was, a certain contract of an entirely different character, which contract he also offered to produce in evidence; that the contract offered to be produced was a contract appointing him, defendant, agent to sell a certain patent right, and no other or different

contract, and not the note in question; and that the supposed note was never delivered by the defendant to any one. It was at the same time stated that the defendant did not claim to prove that the plaintiff did not purchase the supposed note before maturity and for value. To this evidence the plaintiff objected, and the objection was sustained by the court, and the evidence excluded, to which the defendant excepted; and this presents the only question.

We think it was error to reject the testimony. The two cases cited by counsel for the defendant (Foster v. McKinnon, L. R. 4 C. P. 704, and Whitney v. Snyder, 2 Lans. [N. Y.] 477) are very clear and explicit upon the point, and demonstrate, as it seems to us, beyond any rational doubt, the invalidity of such paper even in the hands of a holder for value, before maturity, without notice. The party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

The reasoning of the above cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a bona fide holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or bona fide holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is petitio principii—begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning and investigation, by assuming the truth of the conclusion, and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purposes of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether trans-

ferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. It must always be competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts, as by infants, married women, or insane persons; or where they are void for other cause, as for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instruments by putting them in the form of negotiable paper. See Veeder v. Town of Lima, 19 Wis. 297 to 299, and authorities there cited. See, also, Thomas v. Watkins, 16 Wis. 549.

And identical in principle, also, are those cases under the registry laws, where the bona fide purchaser for value of land has been held not to be protected when the recorded deed, under which he purchased and claims, turns out to have been procured by fraud as to the signature, or purloined or stolen, or was a forgery, and the like. See Everts v. Agnes, 4 Wis. 343 [65 Am. Dec. 314], and the remarks of this court, pages 351–353, inclusive.

In the case first above cited, the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guaranty. In an action against him as indorser, at the suit of a bona fide holder for value, Lord Chief Justice Boville directed the jury that, "if the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict;" and this direction was held proper. In delivering the judgment of the court upon a rule nisi for a new trial, Byles, J., said: "The case presented by the defendant is that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that when he signed one thing, he was told and believed he was signing another and an entirely different thing; and that his mind never went with his act. It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs, then, at least, if there be no negligence, the signature so obtained is of no force; and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature—in other words, that he never intended to sign, and there-

fore, in contemplation of law, never did sign, the contract to which his name is appended."

And again, after remarking the distinction between the case under consideration and those where a party has written his name upon a blank piece of paper, intending that it should afterwards be filled up, and it is improperly so filled, or for a larger sum, or where he has written his name upon the back or across the face of a blank bill stamp, as indorser or acceptor, and that has been fraudulently or improperly filled, or, in short, where, under any circumstances, the party has voluntarily affixed his signature to commercial paper, knowing what he was doing, and intending the same to be put in circulation as a negotiable security, and after also showing that in all such cases the party so signing will be liable for the full amount of the note or bill, when it has once passed into the hands of an innocent indorsee or holder, for value before maturity, and that such is the limit of the protection afforded to such an indorsee or holder, the learned judge proceeded:

"But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or an order for admission to Temple Church, or on the flyleaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons—first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract. In the present case, the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument."

The other case first above cited, Whitney v. Snyder, was in all respects like the present, a suit upon a promissory note by the purchaser before maturity, for value, against the maker, and the facts offered to be proved in defense were the same as here; and it was held that the evidence should have been admitted.

In Nance v. Lary, 5 Ala. 370, it was held that where one writes his name on a blank piece of paper, of which another takes possession without authority therefor, and writes a promissory note above the signature, which he negotiates to a third person, who is ignorant of the circumstances, the former is not liable as the maker of the note to the holder. In that case the note was written over the signature by one Langford, and by him negotiated to the plaintiff in the action, who sued the defendant as maker. Collier, C. J., said: "The making of the note by Langford was not a mere fraud upon the defendant. It was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a title and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."

And in Putnam v. Sullivan, 4 Mass. 54, 3 Am. Dec. 206, Chief Justice Parsons said: "The counsel for the defendants agree that, generally, an indorsement obtained by fraud will hold the indorsers according to the terms of it; but they make a distinction between the cases, where the indorser, through fraudulent pretenses, has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail, as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others." See, also, 1 Parsons on Notes and Bills, 110 to 114, and cases cited in notes.

The judgment below must be reversed, and a venire de novo awarded.[3]

MASSACHUSETTS NAT. BANK v. SNOW.

(Supreme Judicial Court of Massachusetts, Suffolk. 1905. 187 Mass. 159, 72 N. E. 959.)

Contract on three promissory notes, each for $2,432.33, dated December 9, 1899, payable to and indorsed by the defendant and discounted by the plaintiff, as described in the first paragraph of the opinion. Writ dated April 25, 1900. At the trial in the superior court before Harris, J., the jury returned a verdict for the defendant;

[3] Accord: Lewis v. Clay, 77 L. T. R. (N. S.) 653 (1897); Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212 (1907).

and the plaintiff alleged exceptions, raising the questions stated by the court.[4]

KNOWLTON, C. J. This is an action of contract on three promissory notes, signed, "H. G. & H. W. Stevens," payable to the order of the defendant, indorsed by him in blank, and discounted by the plaintiff. They severally bear date December 9, 1899, and the rights of the parties are accordingly governed by St. 1898, p. 492, c. 533, sometimes called the "Negotiable Instruments Act," which is now embodied in Rev. Laws, c. 73, §§ 18–212, inclusive. In referring to different provisions of this statute, it may be convenient to cite the sections of the Revised Laws, rather than those of the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. & H. W. Stevens, has deceased; and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and discounted at the plaintiff bank, and that they were altered by the insertion of the words "seven per cent." after the words "with interest." The defense is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness; that, after he had indorsed them in blank, and put them in his desk for collection or discount, he was called out of his office, leaving the maker, Stevens, there; and that Stevens then took them without right, and three days later carried them to the plaintiff bank, and caused them to be discounted for his own benefit. * * *

The defendant's contention that, after the notes had been delivered to the defendant and indorsed by him, they were stolen by Stevens, brings us to the question whether, under the negotiable instruments act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. Wheeler v. Guild, 20 Pick. 545, 550, 553, 32 Am. Dec. 231; Worcester County Bank v. Dorchester & Milton Bank, 10 Cush. 488, 57 Am. Dec. 120; Wyer v. Dorchester & Milton Bank, 11 Cush. 51, 53, 59 Am. Dec. 137; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; London Joint Stock Bank v. Simmons, [1892] App. Cas. 201, and cases cited; Smith v. Union Bank of London, 1 Q. B. D. 31; Goodman v. Simonds, 20 How. 343, 365, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Hotchkiss v. National Shoe &

[4] Part of the opinion is omitted.

Leather Bank, 21 Wall. 354, 22 L. Ed. 645; Kinyon v. Wohlford, 17 Minn. 239 (Gil. 215), 10 Am. Rep. 165; Clarke v. Johnson, 54 Ill. 296; Seybel v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9; Kuhns v. Gettysburg National Bank, 68 Pa. 445.

The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." Rev. Laws, c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course, this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note, payable to bearer, it is a wholesome and salutary provision. See Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N. Y. Supp. 922.

Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note not only was complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of Rev. Laws, c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," was inapplicable. The instrument had taken effect, and was subsequently negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer.

Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise.

We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There was also error in the instructions given as to the alleged alteration of the notes. By Rev. Laws, c. 73, § 141, it is provided that "when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This language is directly applicable to the present case. See Scholfield v. Earl of Londesborough (1894) 2 Q. B. 660; (1895) 1 Q. B. 536; (1896) A. C. 514; Schwartz v. Wilmer, 90 Md. 136, 143, 44 Atl. 1059.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it necessary to determine at this stage of the case whether the plaintiff should amend its declaration by inserting counts upon the notes as they were

before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only 6 per cent. See Mutual Loan Association v. Lesser, 76 App. Div. 614, 78 N. Y. Supp. 629. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.[5]

PERRY v. BIGELOW.

(Supreme Judicial Court of Massachusetts, Worcester, 1880. 128 Mass. 129.)

Contract on a promissory note for $5,000 signed by the defendant and indorsed by the payee. Trial in the superior court, before Dewey, J., who reported the case for the consideration of this court in substance as follows:

The defendant offered to show that, on January 11, 1877, the parties made an oral contract, by which the plaintiff was to let the defendant have $5,000 in money, less the interest for four months, and the defendant was to transfer to the plaintiff certain shares of the Scotia Lead Mining Company, and at the end of the four months the defendant was to have the right to have the stock back by paying the $5,000, and, if he did not do so, the plaintiff was to have the stock absolutely, and the defendant was not to pay the $5,000; that the parties were at the bankinghouse, of which the plaintiff was president, and he suggested that he would like to have it appear as a bank transaction, and accordingly went to the adjoining room, where was the cashier, and returned to the defendant with the note declared on; and that the same was then duly executed by the defendant and delivered to the plaintiff, who paid him $5,000, less four months' discount. It was agreed that the note was made payable to the cashier for the accommodation of the plaintiff, and that neither the bank nor the cashier had any interest therein.

The plaintiff contended that the above offer of proof was not competent. The judge so ruled; and directed a verdict for the plaintiff.[6]

AMES, J. The defendant's written contract was a negotiable promissory note, requiring him to pay a certain sum of money at a definite time. The evidence which he sought to introduce was for the purpose of showing that this written contract was not the real contract between the parties; that the note was merely a memorandum; and that certain certificates of stock described in the note as collateral security should operate as payment of the note at its maturity, if it were not previously paid. This evidence could not be received without doing violence to the rule that oral evidence cannot be admitted

[5] Accord: Greeser v. Sugarman, 37 Misc. Rep. 799, 76 N. Y. Supp. 922 (1902); Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923 (1909).

[6] The statement of facts is abridged.

to alter a written contract, or to annex to it a condition or defeasance not appearing in the contract itself. Adams v. Wilson, 12 Metc. 138, 45 Am. Dec. 240; St. Louis Ins. Co. v. Homer, 9 Metc. 39; Allen v. Furbish, 4 Gray, 504, 64 Am. Dec. 87. It is needless to multiply citations on so familiar a rule of evidence.

Judgment on the verdict.[7]

McFARLAND v. SIKES.

(Supreme Court of Errors of Connecticut, 1886. 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111.)

PARK, C. J. This is a suit upon a note of $300. On the trial in the court below the defendant offered evidence to prove, and claimed to have proved, that previously to the execution and delivery of the note the plaintiff, who was a grand juror of the town of Ellington, where the defendant resided, and was acting as the attorney of one Mary Quinn, accused the defendant of having made an assault upon the person of the said Mary, and threatened him with a criminal prosecution unless he settled with her for the injury; that the defendant thereupon admitted that he had done wrong in the matter, and offered $100 to settle it; that the plaintiff demanded $300, which the defendant was unwilling to pay; that the defendant was without counsel, and asked to be allowed till the following Tuesday to consider the matter, and offered to give his note for $300, to be held by the plaintiff till then, and, if he did not then appear, to be held by the plaintiff as a settlement for the injury to the said Mary, but, if he should appear, to be returned to him to be canceled; that thereupon the plaintiff wrote the note in suit, which the defendant executed and delivered to the plaintiff, to be held by him upon the conditions stated; and that the defendant at the same time declared that he should appear and demand a return of the note. The defendant also offered evidence that on the following Tuesday he appeared before the parties and demanded the return of the note, but that the plaintiff refused to surrender it.

With reference to this evidence the defendant requested the court to charge the jury "that if the note was delivered to the plaintiff with the understanding between him and the defendant that it was to be delivered up to the latter on his demand on the Tuesday following, and the defendant demanded its return on that day, the plaintiff cannot recover, and the verdict must be for the defendant." The court did not so charge the jury, but substantially that if they should find

[7] See Norman v. Norman, 11 Ind. 288 (1858), where the defendant pleaded as an equitable defense that the note was intended as a memorandum only.

all the facts claimed by the defendant to be proved they did not constitute a defense to the action.

We think the court erred in refusing to charge as requested, and in charging as it did. The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract. A written contract must be in force as a binding obligation to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession that fact would be prima facie evidence that it had been delivered; but it would be only prima facie evidence. The fact could be shown to be otherwise, and by parol evidence. Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its nondelivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them.

In the case of Benton v. Martin, 52 N. Y. 570, the court say: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexation of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which the delivery is made."

In the case of Schindler v. Muhlheiser, 45 Conn. 153, the headnote is as follows: "The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. Held, in a suit on the note, that parol evidence was admissible, on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own and upon an understanding with the defendant that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid." The defense in that case was really that the note had never been delivered as a note, binding upon the defendant. The delivery was merely formal, and was so understood by the parties.

See, also, Adams v. Gray, 8 Conn. 11, 20 Am. Dec. 82; Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; Clarke v. Tappin, 32 Conn. 56; Post v. Gilbert, 44 Conn. 9; Hubbard v. Ensign, 46 Conn. 585.

We think the court erred in refusing to charge the jury as requested by the defendant.

The view we have taken of this question renders it unnecessary to consider the other questions made in the case.

There is error in the judgment appealed from; and it is reversed, and a new trial ordered.[8]

NEW LONDON CREDIT SYNDICATE, Limited, v. NEALE.

(Court of Appeal, [1898]. 2 Q. B. 487.)

Appeal of plaintiffs from the judgment of Darling, J., at the trial before him without a jury.

The action was upon a bill of exchange for £110. payable three months after date by indorsees against acceptor, the bill having been indorsed to the plaintiffs by the drawers to whose order it was made payable. The acceptance had been given to the drawers by the defendant, who was the chairman of and interested in a company, in settlement of an action brought by them against the company. The defense set up was that, at the time when the bill was accepted, it was orally agreed between the drawers and the defendant that, if the latter could not meet it at maturity, the drawers would renew it. It was admitted by the plaintiffs, who had given value for the bill, that they had notice of the circumstances under which the bill was accepted, and that they consequently could not claim to stand in a better position than the drawers; but they contended that what took place between the drawers and the acceptor did not amount to a contract to renew the bill, and that, if it did, evidence of such an oral agreement was not admissible to vary the effect of the written instrument. The learned judge held that the evidence showed that the negotiation of the bill by the drawers was in breach of good faith, and consequently the plaintiffs' title to the bill was defective, and they could not maintain the action. He therefore gave judgment for the defendant.[9]

A. L. SMITH, L. J. This is an action upon a bill of exchange by indorsees against acceptor, but it really may be treated as if it were an action by the drawers; for it is admitted that the indorsees stand in no better position than the drawers, as they had notice of the facts upon which the defendant relies. I do not disagree with the learned judge, upon the conflicting evidence with regard to the conversation that took place between the drawers of the bill and the defendant, that there was an agreement by the former that they would not part with the bill, and would renew it, if the defendant was not in a position to

[8] Accord: Hodge v. Smith, 130 Wis. 326, 110 N. W. 192 (1907); Swanke v. Herdeman, 138 Wis. 654, 120 N. W. 414 (1909); Key v. Usher, 99 S. W. 324, 30 Ky. Law Rep. 667 (1907); J. I. Case Co. v. Barnes, 133 Ky. 321, 117 S. W. 418 (1909); Viets v. Silver, 15 N. D. 51, 106 N. W. 35 (1905), semble; Dawson v. Isle, (1906) 1 Ch. D. 633, semble.

[9] Arguments of counsel are omitted.

pay it at maturity. The question is whether that evidence was admissible. The bill is a written instrument by which the defendant undertakes to pay £110. at the end of three months. It has been held, over and over again, that evidence of a contemporaneous oral agreement is not admissible to vary the effect of such an instrument. If the evidence be to the effect that the document is only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled, it is admissible. But that is not this case. This document was signed and handed over as a bill of exchange, but there was an oral agreement that at maturity it should be renewed, if the defendant required it. In other words, although the written document states that the bill is to be met upon a day certain, the parol evidence is that it is not to be then met. Nothing is more clearly settled than that evidence of such an agreement is not admissible. In Abrey v. Crux, L. R. 5 C. P. 37, Willes, J., stated that to be the law as established by the cases of Hoare v. Graham (1811) 3 Camp. 57, and Young v. Austen, L. R. 4 C. P. 553. It was argued by the defendant's counsel that the law as laid down in those cases is altered by the Bills of Exchange Act, 1882. I do not think that it was intended by that act to alter the general law of evidence which renders parol evidence inadmissible for the purpose of contradicting the terms of a written document. The defendant's counsel relied on the terms of section 21, subsec. 2, and section 29, subsecs. 1, 2, of the Bills of Exchange Act, 1882.* He urged that the plaintiffs had notice of a defect in the title of the drawers, because they knew that the bill was negotiated in breach of faith. But, assuming that section 29 has any application to such a case as this, the only way in which a breach of faith could be shown in this case is by showing a breach of the contemporaneous oral agreement, and by the rules of evidence that is inadmissible. For these reasons I am of opinion that the appeal must be allowed and judgment entered for the plaintiffs.

Rigby, L. J. I am of the same opinion. It is a wholesome rule of law that, when parties have put an agreement into writing, parol evidence is not admissible to contradict or vary the terms of the written agreement. There are certain cases which may conveniently be called "escrow" cases where the question is whether the written agreement has ever become an effective agreement, or whether it was only to have effect as an agreement upon some condition being fulfilled which has not been fulfilled. This is not a case of that kind.

Vaughan Williams, L. J. I agree. For lawyers practicing under the old system of pleading there was a convenient test in these cases as to whether the oral evidence which it was sought to give was admissible. If the evidence were such as would support a plea of the general issue in an action of contract, like non est factum, that is to

* The corresponding sections of the N. I. L. are sections 16 and 52.

say, if it amounted to showing that, though the defendant signed the instrument, he signed it on the understanding that it should not be an effective instrument until some condition was fulfilled, then it was admissible.

Appeal allowed.[10]

PUTNAM v. SULLIVAN.

(Supreme Judicial Court of Massachusetts, Suffolk, 1808. 4 Mass. 45, 3 Am. Dec. 206.)

Case by the indorsees against the indorsers of a promissory note, dated December 1, 1804, payable to the defendants or their order. The action was tried at the last November term before Parker, J., when a verdict was given for the plaintiffs for the amount of the note and interest, subject to the opinion of the court whether upon the facts proved, and which were to be reported by the judge, the action could be maintained. If the court should be of that opinion, judgment to be entered according to the verdict, with additional damages for interest to the time of the judgment; if the court should be of a different opinion, a new trial to be granted.

Those facts were, in substance, that the note was payable in 90 days from the date with grace, and that the plaintiffs were innocent indorsees, having received the note indorsed in blank, and paid a valuable consideration for the same. The handwriting of the promisor and indorsers were admitted, the latter being the handwriting of W. B. Sullivan, a partner of the house doing business under the firm of Jno. L. Sullivan & Co. The note being lodged in the Boston Bank for collection, notice was left at the lodgings of the promisor by the messenger of the bank, on the 28th of February, 1805, and on the 3d day of March following the said W. B. S., one of the indorsers, was notified that the note was unpaid. It was also in evidence that the promisor had absconded before the note fell due, and that this fact was known to all the parties at the time.

One of the defendants being abroad in Europe, and the other, about the 1st of December, 1804, having occasion to make a journey from Boston to Philadelphia, intrusted with an apprentice or clerk of the house a number of papers on which one of the house had written the name of the firm in blank, some to be used as notes indorsed by the house, and others as notes in which the house were to be the promisors. These papers were intrusted to a clerk of the defendants to be used when money was to be advanced on the sale of goods by the

[10] Compare Hall v. Bank, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255 (1899), where under facts similar to those in the principal case the defendant filed a bill for specific performance of the parol agreement.

house on commission, or to renew the notes of the house when due at the banks. The clerk was directed to be careful of the blanks left with him, and not to use any for the advance of money on the sale of goods on commission without consulting a brother of the partners. He was further directed to deliver one of the blanks to the promisor upon the note sued in this action, to enable him to renew a note signed by him then in the bank, of which the house were indorsers, and for which he had requested a blank to be left. The promisor called on the clerk for the blank indorsement left for him, and one was delivered to him. Afterwards, pretending that by some mistake it had become useless to him, and feigning to burn in the clerk's presence the name of the firm indorsed, he procured another blank, and by a similar pretension and contrivance he obtained a third and a fourth blank indorsement, the last of which was in fact used for the purpose for which the house had directed a blank indorsement to be given him. The promisor had used one of the prior blank indorsements for making the note sued in this action, which had been negotiated, with the indorsement remaining in blank, to the plaintiffs.[11]

PARSONS, C. J. * * * On the facts in this case we are to decide who shall suffer the loss of the money, the plaintiffs, who it is agreed are innocent indorsees, or the defendants.

It is objected that this note ought to be considered as a forgery of the names of the indorsers, because a note was afterwards written on the face of the paper by the promisor, not only without the direction or consent of the defendants, but against their express instruction, and therefore that it was a false and fraudulent alteration of a writing, to the prejudice of the indorsers.

This objection would have great weight if, when the indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretenses had obtained it, the fraudulent use of it would not be a forgery, because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements (although his discretion was confined), as a delivery by one of the house,

[11] Arguments of counsel and part of the opinion are omitted.

whether he was deceived, as in the present case, or had voluntarily exceeded his direction; for the limitation imposed on his discretion was not known to any but to himself and to his principals.

It is further objected that, if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge the indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser through fraudulent pretenses has been induced to indorse the note he is called on to pay and where he never intended to indorse a note of that description, but a different note and for a different purpose.

Perhaps there may be cases in which this distinction ought to prevail, as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one of two innocent parties must suffer. The indorsees confided in the signature of the defendants, and they could have no reason to suppose that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the indorsers, they were answered, on the information of the promisor, whose character then stood fair, that blank indorsements had been left with the clerk, and that the indorsers had before indorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or too unexperienced to guard against the arts of the promisor. It is to be regretted that the blank indorsements had not been deposited with the brother of the partners, who was directed to be consulted as to the use of them; for then no innocent person would have been a sufferer.

From a view of all the facts as they are presented to us, it is our opinion that the indorsers must be holden, and that judgment must be entered according to the verdict, with the additional interest agreed.

In forming this opinion we have been necessarily led to consider the effect of a different opinion on the commercial part of the community. How far it is common for merchants to intrust their clerks with blank signatures or indorsements is not known. But when merchants are in the habit of indorsing for each other at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes, when they become due. And if the party having these signatures should employ them as names to other negotiable securities not contemplated, and the signatures should for that reason be void, much injury might result to innocent indorsees, or the bank discounts would be greatly embarrassed.

CAULKINS v. WHISLER.

(Supreme Court of Iowa, 1870. 29 Iowa, 495, 4 Am. Rep. 236.)

Action upon a promissory note; defense, that the instrument is a forgery. The cause was submitted to the court without a jury. The court found the following facts: Defendant entered into a contract with one Smith to sell for him, as his agent, grain seeders. At Smith's request, defendant signed his name upon a blank piece of paper, which Smith was to send to the manufacturers of the seeders, that they might know defendant's signature upon orders which he should make upon them for the machines. The signature was made for no other purpose. The instrument in suit was printed over the signature of defendant, so obtained without his knowledge and consent, and the stamp in the same manner attached and canceled. The plaintiff purchased the note before maturity, for a valid consideration, and without knowledge of any matter connected with its execution. Upon these findings, the court held that the note is a forgery and void, and that plaintiff is not entitled to recover thereon. Plaintiff appeals.

BECK, J. A holder of negotiable paper, acquired before dishonor, is not protected against defenses that make void the instrument. He can have no claim upon forged paper against the person whose name is falsely affixed thereto as the maker, and who is without fault as to the forgery and the taking of the paper by the holder. 1 Parsons, Bills and Notes, 75, and authorities cited.

Is the note sued upon a forged instrument? "The making or alteration of any writing with fraudulent intent, whereby another may be prejudiced, is forgery." State v. Wooderd, 20 Iowa, 542; Revision, § 4253. In order to constitute the offense of forgery it is not necessary that the signature of the instrument be false. The instrument may be altered so that it is not the instrument signed by the maker, and, if this be fraudulently and falsely done, it is forgery. So if words be added to change its effect, with like intent it is a forgery. In the case before us the instrument was falsely and fraudulently made over the genuine signature of defendant, which was not obtained for the purpose of binding defendant by any contract. It is evident that this differs, in no respect, from the cases mentioned, and that the note is a forgery and void. See 2 Parsons, Bills and Notes, 584.

The case differs materially in its facts from the cases cited in support of plaintiff's right to recover. In those cases blanks were filled up contrary to the direction of the maker, or without his authority. But in all of such cases the makers intended to execute an instrument that should be binding upon them. Blanks were filled up contrary to the authority given by the makers, or in some other way the instruments were made so that they did not correspond with the intention of the makers; but in all such cases there were makers and instru-

ments, and through the frauds of those to whom the instruments were intrusted they were thus made to be of different effect than was designed by the makers. In these cases it is correctly held that, while the parties perpetrating the fraud in some cases may have been guilty of forgery, yet the makers were bound upon the instruments, as against holders in good faith and for value. The reason is obvious. The maker ought rather to suffer, on account of the fraudulent act of one to whom he intrusts his paper, or who is made his agent in respect of it, than an innocent party. The law esteems him in fault, in thus putting it in the power of another to perpetrate the fraud, and requires him to bear the loss consequent upon his negligence. In the case under consideration no fault can be imputed to the defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it, for it is not unusual, in order to identify signatures, and for other purposes, for men thus to make their autographs. The defendant cannot be regarded as being so far in fault in the transaction that he ought to be required to bear the loss resulting from the crime.

In our opinion the decision of the circuit court is in accord with the law, and is therefore affirmed.

BAXENDALE v. BENNETT.

(Court of Appeal, 1878. 3 Q. B. D. 525.)

Action commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for £50. drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest. At the trial before Lopes, J., without a jury, at the Hilary sittings in Middlesex, the following facts were proved:

The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3d of June, 1872, and was the bona fide holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had

received it from him. The defendant then put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft. He therefore ruled, upon the authority of Young v. Grote, 4 Bing. 253, and Ingham v. Primrose, 7 C. B. (N. S.) 82; 28 L. J. C. P. 294, that the defendant was liable, and directed judgment to be entered for the plaintiff for £50. and costs.[12]

Bramwell, L. J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and, if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a bona fide holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person, telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name bona fide put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not; but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one

[12] The arguments of counsel and parts of the opinions are omitted.

has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank check, with no payee, or date, or amount, and it was stolen; would he be liable or accountable, not merely to his banker the drawee but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a check or bill to the signature; would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of Young v. Grote, 4 Bing. 253, and Ingham v. Primrose, 7 C. B. (N. S.) 82, 28 L. J. C. P. 294, go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument. It has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think, if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. * * *

BRETT, L. J. In this case I agree with the conclusion at which my Brother BRAMWELL has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, LOPES, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

BRAMWELL, L. J., says that the defendant is not liable because, if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover. He does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he

has given secret instructions to the holder as to the amount for which he shall fill it up. He has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: The defendant accepts a bill and puts it into his drawer; it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in Swan v. North British Australian Company, 2 H. & C. 175, 32 L. J. (Ex.) 273, there must be the neglect of some duty owing to some person. Here how can the defendant be negligent who owes no duty to anybody? Against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room. To say that was a want of due care is impossible. It was not negligence for two reasons: First, he did not owe any duty to any one; and, secondly, he did not act otherwise than in a way which an ordinary careful man would act. * * *

BAGGALLAY, L. J., concurred that the judgment ought to be entered for the defendant. Judgment for defendant.[13]

CRUCHLEY v. CLARANCE.

(Court of King's Bench, 1813. 2 Maule & S. 90.)

This was an action against the defendant as drawer of a bill of exchange for £200. The declaration contained several counts, and in one stated the bill to have been made payable to the order of the plaintiff, and in another to the order of ——— (thereby meaning to the order

[13] Compare Smith v. Prosser, [1907] 2 K. B. 735; Moak v. Stevens, 45 Misc. Rep. 147, 91 N. Y. Supp. 903 (1904); Trust Co. v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367 (1909).

of such person as the defendant should cause to be named and inserted in the said bill as payee), and then averred that the defendant caused the name of the plaintiff to be inserted, etc. At the trial before Lord Ellenborough, C. J., at the London sittings after last term, it appeared that the bill had been drawn by the defendant in Jamaica upon one Henry Man, of London, the defendant leaving a blank for the name of the payee, and had afterwards been negotiated in this country by one Vashon, who indorsed it to the plaintiff in payment of an old debt, and the plaintiff inserted his own name as the payee. A verdict was found for the plaintiff.

Denman moved to enter a nonsuit or for a new trial, on the ground that the plaintiff had no right to insert his name in the bill; and he said it was distinguishable from Russel v. Langstaffe, Doug. 513, because there the bill was filled up by one of the original parties.

Lord Ellenborough, C. J. As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant by leaving the blank undertook to be answerable for it when filled up in the shape of a bill.

Le Blanc, J. It is the same thing as if the defendant had made the bill payable to bearer.

Bayley, J. The issuing the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

Per Curiam. Rule refused.

MITCHELL v. CULVER.

(Supreme Court of New York, 1827. 7 Cow. 336.)

Assumpsit on a promissory note, second indorsee against second indorser, tried at the Ulster circuit, April 17, 1826, before Betts, late Chief Judge.

The note was made by Rowe, payable to H. at 60 days, for $200, and purported to bear date November 5, 1825. This note, having a blank for the day of the month, was made on the 27th of November, 1825, and indorsed by H. and the defendant. It was afterwards delivered by the maker to the plaintiff in payment of a debt, who, by direction of the former, filled in the "5."

Verdict for the plaintiff, subject to the opinion of this court.

Sutherland, J. This case is not distinguishable in principle from that of Mechanics' & Farmers' Bank v. Schuyler (a) (decided at the

(a) Mechanics' & Farmers' Bank against Schuyler and others.

Assumpsit; indorsees against first four indorsers, joint payees of a promissory note; tried at the Albany circuit, February 9th, before Duer, Circuit Judge; when a verdict was taken for the plaintiff, subject to the opinion of this court.

Sutherland, J. The note was indorsed by the defendants on the 23d of February, 1825: there being, at that time, no date to it; and the defendants,

last term). The only difference is that here the date was inserted with the knowledge of the plaintiff. But I do not perceive that this can vary the case. When an indorser of a note commits it to the maker, with the date in blank, the note carries on the face of it an implied authority to the maker to fill up the blank. As between the indorser and third persons, the maker, under such circumstances, must be deemed to be the agent of the indorser, and as acting under his authority and with his approbation. Although it is not essential to the legal validity of a note that it should be dated, yet we all know

knowing that fact, (for they read the note before they indorsed it) re-delivered it in that state to the maker. The maker, on the 28th of February, inserted the date of the 28th of January, 1825; and about the 1st of March, negotiated it to the plaintiffs, who were ignorant of the circumstances stated.

The question is, whether, as between these parties, the note is rendered invalid, in consequence of its having been ante-dated, so that it had nearly 30 days less to run, than it would have had if it had been dated as of the day when it was indorsed.

An indorsement on a blank note, without sum, or date, or time of payment will bind the indorser, for any sum, payable at any time, which the person to whom the indorser entrusts it, chooses to insert. It is a letter of credit for an indefinite sum. Russell v. Langstaffe, Doug. 514; Violett v. Patton, 5 Cranch, 151, 3 L. Ed. 61; 2 M. & S. 90; Putnam v. Sullivan, 4 Mass. 54, 55, 3 Am. Dec. 206. If there is an implied discretionary authority in such case to fill all the blanks, it would seem to follow, that such an authority must equally exist to supply one, if one only be left. Accordingly, if the amount be left blank, any sum may be inserted; if the time of payment, it may be fixed at the pleasure of the holder; and in the hands of a bona fide indorsee, the indorser cannot question the transaction, though the blanks may have been filled in a manner entirely different from the understanding and expectation of the indorser, when he put his name upon the note.

It is said that the note in this case was perfect without a date. It is true that the date is not essential to the validity of a bill or note; for where they have no date, the time, if necessary, may be inquired into, and will be computed from the day they were issued. 2 Ld. Raym. 1076; 2 Show. 422; Chit. on Bills, 78; 3 B. & P. 173; Lansing v. Gaine, 2 John. 303, 3 Am. Dec. 422; 13 East, 5. Nor is it necessary to the validity of a note, that a time of payment should be expressed in it. If none be fixed, it is payable on demand. Chit. on Bills, 79; 7 T. R. 427. But if a note is indorsed, perfect in every respect but the time of payment, and that is left blank, can there be any question of the authority of the maker, if the note be re-delivered to him, to insert any time of payment he may think proper, before he puts it in circulation? Can the indorser, in such a case, protect himself from liability, on the ground of an alteration of the note? If not, upon what principle can the insertion of the date, where that is left blank, be considered an alteration? If it be conceded, as it must be, that the maker in this case had an implied authority to fill up the blank at all, the indorser, and not the innocent indorsee, must suffer the consequence of an abuse of that authority, if it has been abused. It is not, in judgment of law, an alteration of the note. The defendant must have contemplated the addition of the date, before the note was to be passed; for it was payable at the Mechanics' & Farmers' Bank. It is believed to be the invariable custom of banks to discount no paper without a date.

The cases of Woodworth v. Bank of America, 19 John. 391, 10 Am. Dec. 239, and Martin v. Miller, 4 T. R. 320, are very distinguishable from this. In the latter case, the date of the bill was originally inserted, and had been actually altered by the holder, without the knowledge or assent of the acceptor. In the first case, the place of payment was inserted without the consent of the indorser.

Judgment for the plaintiff.

that it is necessary to its free and uninterrupted negotiability. A note without a date will not be discounted at our banks, nor pass in the money market, without previous inquiry. All the parties, therefore, to a note intended for circulation, must be presumed to consent that the person to whom such a note is intrusted for the purpose of raising money may fill up the blank with a date. The evidence does not show that the plaintiff paid less for the note than its face.

Judgment for the plaintiff.

AWDE v. DIXON.

(Court of Exchequer, 1851. 6 Exch. 869.)

Assumpsit by payee against maker of a promissory note.

At the trial, before Cresswell, J., at the last York spring assizes, it appeared that the defendant's brother, Richard Dixon, being desirous of borrowing £100. on the security of a promissory note, applied to the defendant to become one of his sureties, which he agreed to do, on the representation of his brother that one Robinson would become his cosurety, and that the defendant should not be responsible unless Robinson joined in the note. On the faith of this representation, the defendant signed the following blank instrument, leaving a space for Robinson's as the first signature: "——— December, 1848. On demand, we do hereby jointly and severally promise to pay to Mr. ———, or order, £100., as witness our hands. William Dixon." Robinson refused to sign the instrument, and Richard Dixon took it in its imperfect state to the plaintiff; and upon R. Dixon's representation that he had authority to deal with it the plaintiff advanced him money upon it, and the blanks were filled up by inserting "26" before "December," and the plaintiff's name as payee. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

A rule nisi was obtained accordingly.[14]

PARKE, B. It is unnecessary to say whether this instrument is a forgery or not; but there is certainly ground for contending that the making of it complete contrary to the directions of the defendant renders it a false instrument as against him. I do not gainsay the position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. But this is a different case. Here the instrument, to which the defendant's name is attached, is delivered to his brother, with power to make it a complete instrument on one condition only; that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority, where, in case of a refusal by Robinson to join, there

[14] The statement of facts is abridged, and the arguments of counsel are omitted.

is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is, "Nemo plus juris in alium transferre potest quam ipse habet." It is a fallacy to say that the plaintiff is a bona fide holder for value; he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority. Consequently the instrument is void as against the defendant.

ALDERSON and PLATT, BB., concurred.

Rule absolute.

BOSTON STEEL & IRON CO. v. STEUER.

(Supreme Judicial Court of Massachusetts, Suffolk, 1903. 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.)

Contract for $1,823.25 for work done and materials furnished for a building of the defendant numbered 811 on Beacon street in Boston. Writ dated April 11, 1899.

At the trial in the superior court before Bishop, J., without a jury, the judge excluded certain evidence offered by the defendant and refused to make certain rulings requested by the defendant. He found for the plaintiff in the sum of $2,043.86, and the defendant alleged exceptions.

LORING, J. The only question in issue between the parties in this case is the right of the defendant to be credited with two sums, of $200 and $100, respectively, under the following circumstances:

On December 31, 1898, the defendant's husband owed the plaintiff $1,781.30, for ironwork furnished by it to him in the construction of a house, No. 819 Beacon street. On being pressed for payment, the defendant's husband, on January 21, 1899, delivered to the plaintiff the defendant's check for $200, payable to the plaintiff. It is stated in the bill of exceptions that on February 2, 1899, "he paid the plaintiff the further sum of $100 in a check made by said Jennie D. Steuer." But it appears from the auditor's report, which was before the court and is referred to in the bill of exceptions, that the plaintiff's manager's name was Newcomb, and that his story was that the check for $400 "was brought to him at his office on Devonshire street by Mr. Steuer in response to further demands for money, and that it was made out in blank and filled up by himself, Mr. Steuer being unwilling that it

should be made for more than $200, while Mr. Newcomb insisted that it should be for the larger amount, and so made it, with Mr. Steuer's consent, and applied it to his debt." The defendant's story was "that she gave the check to Mr. Newcomb at her house."

In addition to the iron furnished the defendant's husband for 819 Beacon street, the defendant's husband had ordered two iron columns and a base plate from the plaintiff for another house, No. 811 Beacon street, which the plaintiff supposed was Steuer's until his manager was told on March 10th that it belonged to defendant's wife. These two columns and base plate were delivered on December 22, 1898, and at the rate charged in the bill of items were worth $150.35. From December to March there were negotiations between the defendant's husband and the plaintiff for a contract by which all the ironwork for 811 Beacon street should be furnished by the plaintiff for a fixed sum, payments on account to be made as each floor was finished; and on or about March 1, 1899, the plaintiff's manager submitted to the defendant a written contract to this effect. On March 10th this was returned by the defendant's husband with the statement already referred to, that 811 Beacon street belonged to his wife, and that the contract should be made with her. No written contract was ever made between the plaintiff and the defendant, but the plaintiff went forward and delivered the ironwork for two of the six stories of the house, part being delivered before March 10th and part after that date. The last was delivered on March 18th, when the plaintiff stopped because it had not been paid for what it had done. Thereupon this action was brought to recover the reasonable value of the materials furnished and work done.

At the trial the defendant contended "that the amount of said payments should be credited to her in this action, on the ground that they were payments required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that the checks were given to her said husband, as her agent, to make such payments," and "offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him, and claimed that the same should be admitted in evidence. The court declined to admit the same, and the defendant duly excepted to the exclusion." The other exceptions taken at the trial have been waived, and the question raised by this exception is the only matter now before us.

The plaintiff has argued that it did not appear but that these instructions were given in a private conversation between husband and wife. But on a fair construction of the bill of exceptions we do not think that the evidence can be taken to have been excluded on that ground. It is stated there that the "defendant offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him." This must be taken to be a statement of the ground of the objection, and the ruling must be taken to be a ruling that competent evidence

was offered and was excluded because not made in the presence of the plaintiff or of some one representing it.

The judge before whom the case was tried without a jury found "that neither of said payments was required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that neither of them was made according to any agreement for payment to be made on account of said 811 Beacon street, and that no floor in said building was completed at the time either of said payments was made, and that said payments were made by said Bernard Steuer on account of his building numbered 819 Beacon street, and were received by the plaintiff on account therefor."

This finding makes the evidence excluded immaterial so far as the check for $200 is concerned. If this evidence had been admitted, the defendant's case on the $200 check would have been this: A check payable to the plaintiff is handed by the drawer to her husband, to be delivered by him to the plaintiff in payment of a debt to become due from the drawer of the check to the payee, and is fraudulently handed by the husband to the payee of the check, in payment of a debt due from him to the payee, and is accepted by the payee in good faith in payment of that debt.

In such a case the payee of the check is a bona fide purchaser of the check for value, without notice, and the drawer could not set up her husband's fraud in defense of the check, nor maintain an action for money had and received after payment of it on discovering the fraud.

The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a bona fide purchaser of it at common law, with all the rights incident to a purchaser for value thereof without notice. That was decided in Watson v. Russell, 3 B. & S. 34, and affirmed in the Exchequer Chamber in the same case, 5 B. & S. 968. To the same effect is Poirier v. Morris, 2 El. & Bl. 89, and Nelson v. Cowing, 6 Hill (N. Y.) 336, 339. Munroe v. Bordier, 8 C. B. 862, and Armstrong v. American Exchange Bank, 133 U. S. 433, 453, 10 Sup. Ct. 450, 33 L. Ed. 747, seem to go on this ground. The case of Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446, might have been decided on this ground, but was disposed of on common-law principles.

That payment of the pre-existing debt makes the holder a purchaser for value in this commonwealth was settled law before the negotiable instruments act was enacted. Blanchard v. Stevens, 3 Cush. 162, 50 Am. Dec. 723; Stoddard v. Kimball, 6 Cush. 469. Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 199, 25 N. E. 100; National Revere Bank v. Morse, 163 Mass. 383, 40 N. E. 180; Holden v. Phœnix Rattan Co., 168 Mass. 570, 47 N. E. 241.

The checks in question in the case at bar were given after the negotiable instruments act (St. 1898, c. 533; Rev. Laws, c. 73) went into effect, and are governed by its provisions. The plaintiff is a holder in due course of the $200 check, within Rev. Laws, c. 73, § 69. This

section is taken from section 29 of the English bills of exchange act of 1882, and Watson v. Russell is cited in Chalmers, Bills of Exchange (5th Ed.) 89, as an example of a person who is a holder in due course within that section. It was stated by Lord Russell in Lewis v. Clay, 67 L. J. Q. B. (N. S.) 224, that a payee of a promissory note cannot be a holder in due course within section 29 of the English bills of exchange act of 1882. In Hardman v. Wheeler, [1902] 1 K. B. 361, 372, it was pointed out that this statement of Lord Russell was obiter, and it was also pointed out that in Herdman v. Wheeler, as in Lewis v. Clay, it was not necessary to pass on that point. The case of Watson v. Russell, 3 B. & S. 34; S. C. 5 B. & S. 968, does not seem to have been brought to the attention of the court in either of these cases. And in neither case does the court seem to have taken into consideration the practice of a check being procured drawn by another to be used in paying a debt due from the person procuring the check to the person to whom the debtor has had the check made payable. The practice is recognized in the case of foreign bills of exchange, and the person procuring the bill is known technically as the "remitter" of it. See Munroe v. Bordier, 8 C. B. 862, where it was held that the payee of a foreign bill, who took it from the remitter of it for value, was a bona fide purchaser for value. It was this practice which was applied in Watson v. Russell, 3 B. & S. 34, in case of a check. In our opinion, a check received by the payee named in it, in payment of a debt due from the remitter of the check, is received by a holder in due course within section 69 of the negotiable instruments act (St. 1898, c. 533; Rev. Laws, c. 73), and that is so even if we should follow the decision made in Hardman v. Wheeler, [1902] 1 K. B. 361, and hold that a payee never can be a holder in due course to whom the bill has been "negotiated," within the last clause of section 31 of our act (Rev. Laws, c. 73), which is taken from section 20 of the English bills of exchange act of 1882 (45 & 46 Vict. c. 61). The rule that payment of a pre-existing debt makes the holder a holder for value was adopted in Rev. Laws, c. 73, § 42.

But so far as the check for $400 is concerned, we are of opinion that the evidence should have been admitted. If the defendant's story were found to be true, namely, that she handed the check to the plaintiff's manager at her house, this check would stand on the same footing as the other. But the story of the plaintiff's manager was that the check was brought to him by the defendant's husband, signed in blank by the defendant, and that it was filled up by him for the sum of $400, with the husband's consent. We assume, in favor of the plaintiff, that this is to be interpreted to mean that the only blank in the check, when it was brought to the plaintiff's manager by the defendant's husband, was in the amount for which it was to be drawn.

It had been held in England, before the bills of exchange act in 1882, that such a piece of paper is not a check; that one who buys it buys an incomplete instrument and his rights depend upon the real authori-

ty which the signer had in fact given in the matter. Awde v. Dixon, 6 Exch. 869. See, also, Hatch v. Searles, 2 Sm. & G. 147; Hogarth v. Latham, 3 Q. B. D. 643; Watkin v. Lamb, 85 L. T. (N. S.) 483; France v. Clark, 26 Ch. D. 257, 262. And see Ledwich v. McKim, 53 N. Y. 307. Such an incomplete instrument is prima facie authority to fill in the blank. Crutchly v. Mann, 5 Taunt. 529; Swan v. North British Australasian Co., 2 H. & C. 175, 184. But this prima facie authority, as we have said, may be met by evidence of what authority was in fact given, as was done in Awde v. Dixon, 6 Exch. 869. If the blanks are filled up before the instrument is negotiated, it does not lie in the maker's mouth to set up that it was incomplete when delivered by him. In such a case, a plaintiff who buys for value without notice gets the rights of a bona fide purchaser for value of a negotiable instrument; and the fact that there was no authority for filling up the blanks as they were filled up, or the fact that the paper was otherwise wrongfully dealt with, is no defense. Schultz v. Astley, 2 Bing. N. C. 544; Foster v. Mackinnon, L. R. 4 C. P. 704, 712.

In this commonwealth it was held, on the other hand, that a note with a blank for the payee's name was a promissory note, and not an incomplete paper, which might be made into a promissory note. Ives v. Farmers' Bank, 2 Allen, 236. And in Frank v. Lilienfeld, 33 Grat. (Va.) 377, it was held that the purchaser in good faith of a note in printed form, indorsed by the defendant, where the date, payee's name, and amount had been left blank, had an absolute right to fill in the amount advanced thereon and to fill up the other blanks. It also has been held here, as it has been held in England, that such a blank, in the absence of other evidence, might be filled in by a bona fide purchaser (see Androscoggin Bank v. Kimball, 10 Cush. 373); and that a bona fide purchaser of such a paper, which is filled before it is negotiated, has the rights of a purchaser for value without notice (see Whitmore v. Nickerson, 125 Mass. 496, 28 Am. Rep. 257; Binney v. Globe National Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379). See, also, in this connection, Herdman v. Wheeler, [1902] 1 K. B. 361.

It is not necessary to consider how a blank check would be dealt with in Massachusetts at common law, where the amount in place of the name or date is lacking. The negotiable instruments act (Rev. Laws, c. 73, § 31) adopted the English law on this point, and it follows that, if Newcomb's story is to be believed, the blank check brought to him must be treated as an incomplete instrument and not as a check.

The defendant further contends that it was inadmissible to show the real authority given to the husband in the absence of the plaintiff, and cites in support of that contention Markey v. Mutual Benefit Ins. Co., 103 Mass. 78, 93, and Byrne v. Massasoit Packing Co., 137 Mass. 313. These are cases where the act done was within the ostensible scope of the authority given an agent, and for that reason the real authority could not be invoked. The only act relied on as giving ostensible authority to the husband in the case at bar was putting him in

possession of the blank check. There was no more ostensible authority here than there was in Awde v. Dixon, 6 Exch. 869, Hogarth v. Latham, 3 Q. B. D. 643, or Watkin v. Lamb, 85 L. T. (N. S.) 483. An incomplete check gives an authority to fill it up which is only a prima facie authority. It does not import an ostensible authority to fill it up, which is absolute.

The plaintiff's rights under the blank check for $400, and to the money received for it, depend upon the authority actually given by the defendant when she signed it, and the evidence offered should have been admitted in respect of the credit claimed for the $400 paid under the blank check.

The entry must be: Exceptions sustained.[15]

[15] As to the $400 check: Accord: Guerrant v. Guerrant, 7 Va. Law Reg. 639 (1902).

As to the $200 check: Accord: Thorpe v. White, 188 Mass. 333, 74 N. E. 592 (1905). Contra: Hathaway v. Delaware County, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909 (1906); Lewis v. Clay, 67 L. J. Q. B. 224 (1898), semble.

Compare Herdman v. Wheeler, [1902] 1 K. B. 361; Lloyd's Bank v. Cook, [1907] 1 K. B. 794; Vander Ploeg v Van Zunk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275 (1907). See, also, Smith v. Prosser, [1907] 2 K. B. 735.

CHAPTER IV

CONSIDERATION[1]

2 BLACKSTONE, COMM. 445, 446.

A consideration of some sort or other is so absolutely necessary to the formation of a contract, that a nudum pactum, or agreement to do or pay anything on one side, without compensation on the other, is totally void in law; and a man cannot be compelled to perform it. * * * [But] if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration in order to evade payment; for every bond, from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration.[2]

STARR v. STARR.

(Supreme Court of Ohio, 1858. 9 Ohio St. 74.)

Error to the court of common pleas of Athens county. Reversed in the district court.

On the 8th day of October, 1857, the plaintiff filed in the court of common pleas of Athens county her petition against the defendant,

[1] For cases as to what constitutes such a parting with value as to make a holder one in due course, see part II, chapter II, section 1.

[2] "Now we do not admit that, when one voluntarily makes a written promise to another to pay a sum of money, the promise can be avoided merely by proving there was no legal and valuable consideration subsisting at the time, any more than, if he actually paid over the amount of such note, he can recover it back again, because he repents of his generosity. * * * We are satisfied that none of the decisions respecting the avoidance of notes or other written promises for want of consideration are impeached by our decision in this case. A careful examination will discover that in all those cases the ground taken in defense is, not that there was originally no consideration, contrary to the express admission of the promisor, but that the consideration had failed, or that it rested in mistake or misapprehension; what the parties supposed to be a consideration turning out in fact to be none. It was on this principle that the case of Boutell et al. v. Cowden, Adm'r, 9 Mass. 254, was decided. In those cases the promisor is always permitted, against the party with whom he contracted, to show the mistake, or the failure of what was supposed to be substantial. This does not contradict his own acknowledgment of value received, but sets up an equitable claim of discharge, upon the ground that both parties were deceived in the contract. Fraud, illegality, and imposition are also proper defenses against actions to enforce such promises, depending upon other principles." Bowers v. Hurd, 10 Mass. 427, 429, 430 (1813), overruled in Hill v. Buckminster, 5 Pick. (Mass.) 393 (1827), and Parish v. Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378 (1833).

stating that Philip M. Starr, in his lifetime, made and delivered to plaintiff his certain promissory note in writing for the payment, to plaintiff or bearer, of $5,000 on demand; that said Philip M. Starr, after the delivery of the note, departed this life, leaving it unpaid; and that demand had been made of the defendant, as his executor, for the allowance or payment of the note, and that he refused to do either. Whereupon judgment is asked for the amount of the note and interest.

To this petition the defendant answered: (1) That his said testator, Philip M. Starr, never made the note in the petition mentioned, and never assumed and promised as therein stated. (2) That, if said testator did make said note, the same was made without any consideration, or value whatever, moving from the plaintiff to said testator.

At the May term, 1858, of said court, the cause was submitted to the court, and the court found "that the said promissory note was executed and delivered by the said testator, as the said plaintiff hath in her said petition averred. And the court further find that the said note was given by the said testator a short time before his death to the said plaintiff, who was the daughter of said testator, as an advancement and gift by the said testator to the said plaintiff, and as some provision for her out of his said estate, and without any other or different consideration whatever. And the court, being of opinion that, by law, natural love and affection, and a desire on the part of the testator to provide for and advance the said plaintiff, are not a good and sufficient consideration to enable the plaintiff to recover on said note, do find that said note was without consideration, as said defendant hath in his said answer averred." Thereupon judgment was rendered against the plaintiff for costs, and she excepted to the ruling and judgment. To reverse this judgment, the plaintiff filed a petition in error in the district court, insisting that the court of common pleas erred: (1) In ruling "that, by law, natural love and affection, and a desire on the part of the testator to provide for and advance the said plaintiff, are not a good and sufficient consideration to enable the said plaintiff to recover on said note." (2) In finding that the note was without consideration. (3) In rendering judgment against the plaintiff, when it should have been for her.

The questions thus presented were reserved in the district court for decision by the supreme court.

PER CURIAM. The judgment of the court of common pleas must be affirmed, upon the principles settled in the case of Hamor v. Moore's Adm'rs, 8 Ohio St. 239.

The note in the case before the court was a gift, and its delivery was the delivery of a promise only, and not of the thing promised. The promise being unfulfilled at the death of the maker of the note, the gift failed. And as the promise was without consideration, and could not have been enforced against the maker in his lifetime, it cannot be against his executor.

Judgment affirmed.

EASTON v. PRATCHETT.

(Court of Exchequer, 1835. 1 Cromp., M. & R. 798.)

Assumpsit on a bill of exchange drawn by the defendant in his own favor upon Peter Maddocks, and indorsed by the defendant to the plaintiff. Plea, that the defendant indorsed said bill to the plaintiff without consideration, and that the defendant has not at any time received any value or consideration for or in respect of said indorsement. Replication that the defendant received from the plaintiff a good and sufficient consideration for and in respect of said indorsement concluding to the country. The jury found a verdict for the defendant. A rule nisi to enter judgment non obstante veredicto for the plaintiff was obtained.[3]

Lord ABINGER, C. B. * * * It is clear that on this issue both parties were at liberty to go into evidence as to the consideration for the indorsement of the bill. It appears, in point of fact, that they did so; for evidence was given upon it on both sides, and the jury have found for the defendant. It is therefore established by the verdict that the bill was indorsed without consideration; but it has been argued that this plea is bad, because in its language it does not necessarily exclude that species of consideration which does not lie in tangible possession, but is something of a different nature, such as the forbearing to sue, or a guaranty of another person's debt, which are not pecuniary considerations capable of possession, and it is said that such considerations cannot properly be said to be had or received by the defendant. We are of opinion, however, that this objection cannot be sustained. Whatever be the nature of the consideration, if it is actually obtained, the party may both in legal and common language be said to have had and received it. If a man is to have credit, and it is given to him, he has that for which he stipulates. So, if a bill is given for forbearance, the party may be said to have the consideration, because he actually possesses the benefit of that forbearance. This appears to us to be a sufficient answer to this objection. But it is further contended that the plea is bad, because it does not exclude the case of the bill having been delivered to the plaintiff by way of gift; that is, that an indorsement may be without consideration, yet if it be intended to be a gift, it will be binding. Supposing it to be true that such gift is binding, in one sense indeed the indorsement may be said to be without consideration, as it is without pecuniary consideration; but if it can be the subject of an action, it can only be on the ground of there being some consideration, as of favor or affection, or the desire to promote the interests of another. Without any violence to language, the terms used in this plea may so be construed, and that would be a sufficient answer to this objec-

[3] The statement is abridged, and the argument of counsel and part of the opinion omitted.

tion; but I own that I go further. If a man give money as a gratuity, it cannot be recovered back, because the act is complete, yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing, not under seal, can have any binding effect. The law makes no difference between such a promise and a verbal one. There is the same distinction as to a bill of exchange. If a party gives to another a negotiable instrument, on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill;[4] but it is a very different question whether the giver binds himself by the indorsement, so as to make himself liable thereupon to the person to whom he gives it. There is no decision that he does, and there is a strong authority the other way, and the prevailing opinion in the profession is that a parol promise of a gift, whether verbal or in writing, will not be binding. It appears, therefore, that the supposition of a gift, which has been made for the purpose of this argument, would not support the action. We are of opinion, however, that the plea must be taken to negative the existence of any such consideration, even supposing that it would be sufficient. Upon the whole, we think that the plea must now be considered as alleging that no consideration existed, and that after verdict it cannot be disturbed.

Rule discharged.

THOMPSON v. CLUBLEY.

(Court of Exchequer, 1836. 1 Mees. & W. 212.)

Assumpsit, by the indorsee against the acceptor of a bill of exchange for £200. drawn by one H. R., payable to his own order, and by him indorsed to the plaintiff.

Plea: That the bill of exchange was wholly made by H. R., at the request and for and by way of accommodation of and for the plaintiff, and was accepted by the defendant, at the request of H. R., for and by way of like accommodation of and for the plaintiff, and that at the time of making and accepting the said bill of exchange it was expressly agreed, by and between the said parties, that if the said bill of exchange should happen to be outstanding at the time when it became due, it should be taken up and paid by the plaintiff, and that no claim or demand should at any time be made against the defendant or H. R., upon or in respect of it—concluding with a verification.

Replication: That before and at the time of the commencement of the suit the plaintiff was, and still is, the holder of the said bill of exchange for good and sufficient consideration, in respect of his be-

[4] Accord: Milnes v. Dawson, 5 Exch. 948 (1850).

ing the holder thereof; without this, that the said bill was either made or accepted by way of accommodation of or for the plaintiff, or that it was agreed by or between the parties, in manner and form as the defendant has above in the same plea in that behalf alleged—concluding to the country.

The case came on for trial at the sittings after Easter term, before Lord Abinger, C. B., when the defendant, in support of his plea, called H. R., who stated that in the spring of 1833 he had occasion to raise money, and having applied to an attorney to assist him, it was arranged between him and the plaintiff that the witness should give him the bill on which the present action was brought, but which should be taken up by the plaintiff, and that witness should receive bills of like value from the plaintiff, for which witness was to provide, and that the defendant had not received any value for his acceptance. It was objected, on the part of the plaintiff, that this evidence was inadmissible, as it went to contradict the written contract of acceptance, which purported to be an absolute engagement to pay the bill; whereas it was proposed to show that the acceptor was not to pay it, but that the plaintiff, who was the indorsee, was to take it up, and not to sue the acceptor, the effect of which was to make an entirely different contract. Foster v. Jolly, 1 C., M. & R. 709, was relied upon as in point, but the objection was overruled. It was then contended that the exchange of bills between the plaintiff and H. R., the drawer and indorser, was sufficient consideration to entitle the plaintiff to sue the acceptor of the present bill. The learned judge, however, said that, in his opinion, this bill had really been taken by the plaintiff on a special contract by him not to sue the defendant, and as that was proved by the evidence, the plea was made out. Whereupon the plaintiff's counsel elected to be nonsuited, the learned judge giving him leave to move to enter a verdict for the amount of the bill, if the court should be of opinion that the plaintiff was entitled to recover.

G. Henderson now moved accordingly, on the grounds taken at the trial.

Sed PER CURIAM. This defense was clearly admissible, inasmuch as it showed that the acceptance was in truth for the accommodation of the plaintiff, and that all the parties put their names to the bill without consideration. With regard to the evidence being inconsistent with the terms of the instrument, we are of opinion that the agreement as to payment was collateral, and not part of the original contract. It was a collateral agreement, that the plaintiff would not enforce the contract upon the bill.

Rule refused.

COMMERCIAL BANK OF LAKE ERIE v. NORTON & FOX.

(Supreme Court of New York, 1841. 1 Hill, 501.)

Assumpsit, tried at the Erie circuit, before Gridley, Chief Judge, August 29, 1840. The plaintiffs sought to recover as indorsees of two bills of exchange drawn by Gillespie, Joice & Co., on E. Norton & Co., payable to Gillespie & Woodruff, at sixty days after date. The firm of E. Norton & Co. was composed of said Norton and Simeon Fox, two of the defendants, who alone defended the suit.

The acceptance on each of the bills was in this form, "E. Norton & Co., per A. G. Cochrane," and was in Cochrane's handwriting.

The bills were discounted on the day of the date, by the plaintiffs for the drawers, and were afterwards accepted for the drawers' accommodation; the defendants Norton and Fox having no funds of the drawers, but the latter being then largely indebted to them.

Verdict for the plaintiff. The defendant moved for a new trial on a bill of exceptions.[5]

COWEN, J. * * * But the point most confidently pressed against the plaintiffs is that, the drawers having had no funds in the defendants' hands, the latter are entitled to the same defense as if the drawers themselves were plaintiffs. Put thus broadly, it is admitted to be a point directly against the almost entire current of British authority. Kerrison v. Cooke, 3 Camp. 362; Raggett v. Axmore, 4 Taunt. 730; Fentum v. Pocock, 5 Taunt. 192; Carstairs v. Rolleston, 5 Taunt. 551; Harrison v. Courtauld, 3 Barn. & Ad. 36; Nichols v. Norris, 3 Barn. & Ad. 41, note. The cases in 3 Camp. and Taunt. were cited and recognized as sound law in Murray v. Judah, 6 Cow. 492. And they all hold that the acceptor of an accommodation bill must, in respect to the holder, be considered as the principal; and some of them say that he cannot divest himself of that character, even though the holder took it from the person to whom it was lent, with knowledge that it was accommodation paper. In such case, accordingly, though the holder release, or give time to the drawer or indorser who borrowed the bill, that does not discharge the acceptor. No doubt, the want of bona fides in the holder will let in a defense that the bill was accepted without consideration. But is there any want of good faith in advancing money and taking a bill from the borrower, with knowledge generally that it was accepted for his accommodation? There certainly is not, unless it be known that it was made for some purpose different from that for which it is used. Grant v. Ellicott, 7 Wend. 227.[6]

[5] Part of the case relating to a question of agency is omitted.

[6] Accord: Black v. Bank, 96 Md. 399, 54 Atl. 88 (1903); Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666 (1903); White v. Savage, 48 Or. 504, 87 Pac. 1040 (1906); Willard v. Crook, 21 App. D. C. 237 (1903). Compare In re Hopper-Morgan Co. (D. C.) 156 Fed. 525 (1907).

But the question does not arise here. In this case the money was advanced to, and the bills taken from, the men to whom they were lent, without notice that the defendants were destitute of effects belonging to the drawers, much less that they would continue destitute.

The bills, however, were not yet accepted when the plaintiffs took and discounted them. This raises the objection that the latter discounted the bills on the credit of the drawers and indorsers alone, and relieves the defendants to a certain extent from the doctrine of estoppel. They did not induce the plaintiffs to loan money by previously putting their names on the paper; and the question is whether there be any other principle on which they are liable. I think there clearly is. The acceptance of a bill of exchange to secure the debt of a third person is more than a mere special guaranty. The latter must show a consideration on its face. The acceptance of a bill imports a consideration; and though there was none in this case, as between the drawers and the defendants, yet it was not enough to stop with showing that. The defendants should, at least, have shown beside that the bills were suffered to lie and to mature before they were presented for acceptance. They were drawn at 60 days after date and discounted on the day of their date, and, by acceptance presently, a delay to collect of the drawers would necessarily ensue. Till the contrary is shown it must be intended that the acceptance was with a view to such forbearance, and in fact worked that consequence.

This leaves the case open to the presumption that the acceptances were in consideration of the forbearance. It is not enough to defeat a note or bill that it appear on its face to have been made or accepted as security for a precedent debt of a third person. Popplewell v. Wilson, 1 Str. 264. It will still be intended that something collateral to the debt, and something adequate, formed the consideration; and the maker or acceptor must negative every possible intendment. This was held in Ridout v. Bristow, 1 Tyrw. 84, 1 Crompt. & Jerv. 231, and stated also in Chit. on Bills, 80, a (Am. Ed. of 1839) note (g). The subject is fully considered there, in the point of view now mentioned. It is not to be disguised that a naked precedent debt of another is not per se such a consideration as will sustain a promise or acceptance. The books on Guaranties all show that it is not, as well as the treatises on Promissory Notes and Bills. Yet nothing is more common than to rely on the note of A. taken as a security for the debt of B. It is like a special guaranty stating value received, which words, I take it, cannot be contradicted so as to destroy the guaranty. See McCrea v. Purmort, 16 Wend. 471, 472, 30 Am. Dec. 103. Accepting a bill or making a note is the same thing in legal effect; and it was held, in the case just cited from the Exchequer Reports, that the words "value received" could not be met and overcome by parol. Vide, also, Woodbridge v. Spooner, 3 Barn. & Ald. 233, 1 Chit. Rep. 661. You can no more contradict the legal effect of the words

in a note than its direct expression. Thompson v. Ketcham, 8 John. 189, 5 Am. Dec. 332.

Besides, the case is, I think, open to another intendment. When a man borrows money and draws on his friend, who accepts, it should be intended that the acceptor authorized him originally to borrow on the terms that he would accept, which is equivalent to a request of the loan on the part of the acceptor.

New trial denied.

JARVIS v. WILSON.

(Supreme Court of Errors of Connecticut, 1878. 46 Conn. 90, 33 Am. Rep. 18.)

See ante, p. 29, for a report of the case.

BAKER v. WALKER.

(Court of Exchequer, 1845. 14 Mees. & W. 465.)

Debt. The first count of the declaration stated, that the defendant was indebted to the plaintiff in the sums of £13. 2s. 6d. and £7. 13s., upon a judgment recovered against the defendant. The second alleged that, on the 21st of March, 1844, the defendant made his promissory note, and thereby promised to pay the plaintiff £26. 5s. three months after the date thereof.

Plea to the second count, as far as the same relates to the sum of £20. 15s. 6d., parcel of the said sum of £26. 5s., that the said promissory note was made and delivered by him the defendant to the plaintiff for and on account of a certain judgment debt of £20. 15s. 6d., recovered by the plaintiff against the defendant, and that, except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff.

Replication, de injuria.

Special demurrer, assigning for causes that the general replication de injuria is inapplicable to this case, inasmuch as the plea to which it is pleaded involves matter of record, which is not triable by the country.

Joinder in demurrer.

The point marked for argument on the part of the plaintiff was, that the plea was bad, as it showed on the face of it a good and sufficient consideration for making the promissory note.[7]

PARKE, B. I am of opinion that the plea is bad, for it shows there was a debt in existence on account of which the note was made, and that is sufficient to make the note good. It is like the case of a note

[7] The arguments of counsel are omitted.

given for a debt of a third party, which has been held to be a sufficient consideration. It was so held in Popplewell v. Wilson, 1 Strange, 264, and that principle has been acted upon in many other cases. A promissory note, although not a specialty, resembles a specialty, and at all events it is a security. Where a man who has a judgment debt takes from his debtor a promissory note for the amount payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note. Here, there being a judgment debt, a promissory note is given for the amount of it, and that is evidence of an agreement to suspend the judgment until the note is due, which is a sufficient consideration to support an action on the note. This distinguishes the case from Serle v. Waterworth, 4 M. & W. 9. The judgment in that case was reversed on error, in Nelson v. Serle, 4 M. & W. 795, but the allegation that "there never was any other consideration for the note," had been omitted by mistake in the briefs of the case in the court below, and the latter court gave judgment on the assumption that there was no such averment. I am therefore of opinion that the plea is bad, and that the plaintiff is entitled to judgment.

ALDERSON, ROLFE, and PLATT, BB., concurred.

Judgment for the plaintiff.[8]

BANK OF TROY v. TOPPING et al.

(Supreme Court of New York, 1832. 9 Wend. 273.)

This was an action of assumpsit, tried at the Rensselaer circuit in June, 1830, before the Hon. James Vanderpoel, one of the circuit judges.

The plaintiffs declared as the endorsers of a promissory note, given by the defendants to Keating Rawson for $4,000, bearing date 2nd July, 1829, payable sixty days after date. On the trial the note was produced; it was signed thus: "Margaret Topping, administratrix; John Holme, administrator of the estate of John Topping, dec'd;" and there were three endorsements upon it, to wit, $2,734.95, as received of Phillip Viele, surrogate of the county of Rensselaer, on 1st February, 1830, $200 as received of John Holme on 16th February, 1830, and $200 also received of John Holme on 10th April, 1830. The making and endorsement of the note were admitted, and the plaintiff rested. The defendants then offered to prove that John Topping died intestate in September, 1828; that the defendants took out letters of administration on his estate; that at the time of the death of the intestate, the plaintiffs held a note drawn by him and endorsed by Keating Rawson for $5,000, payable at sixty days; that the note now produced is the last of five notes given by the defendants as renewals

[8] See Crawford Bank v. Stagemann, 137 Iowa, 13, 114 N. W. 549 (1908).

from time to time of the note held by the plaintiffs against the intestate at the time of his death, all of which were signed in the same manner as that now produced, and all endorsed by Keating Rawson, the same endorser who was on the note held by the plaintiffs against the intestate at the time of his death; that the defendants having in due course of administration exhausted the personal estate of the intestate, applied to and obtained from the surrogate of the county of Rensselaer an order to sell all the real estate of the intestate; that such real estate was sold, and that the plaintiffs received $2,734.95, endorsed on the note, from the surrogate of Rensselaer, as their portion or dividend of the fund produced by such sale; which evidence was objected to and rejected by the judge, and the plaintiffs had a verdict for $939.96, the balance of the note, after deducting the endorsements thereon. The defendants having excepted to the decision of the judge, now moved for a new trial.

H. P. Hunt, for defendants. The note of the defendants was given for the debt of their intestate; and offering to prove that they had no assets, they were not liable, although the promise was in writing, for there was no consideration for the promise. Although the note is payable at sixty days, the court will not thence infer that forbearance was the consideration, but rather, as the notes were uniformly given by the defendants in their representative character, that it was an arrangement for the benefit of the plaintiffs, by means of which they receive a discount every two months.

J. P. Cushman, for plaintiffs. Forbearance to sue is a good and sufficient consideration for a note given by administrators to pay the debt of their intestate. Here forbearance was extended for the period of a year after the date of the intestate, and the note now in suit itself shews a delay in the collection of the debt sixty days. The consideration need not be averred in the declaration; it is enough that it, as well as the fact that the promise was in writing, be shewn on the trial.

SAVAGE, C. J. Toller, in his Treatise on the Laws of Executors and Administrators, p. 464, says an executor may make himself personally liable by his promise to pay a debt of the testator, or answer damages out of his own estate; but such promise must be in writing, and supported by a sufficient consideration; there must be either assets in his hands or forbearance by the creditor to constitute a consideration. An admission of assets may be implied by the nature of the promise—as if it be accompanied with a declaration that the money is ready, &c. But in case there are no assets, a promise by an executor to pay his testator's debt is nudum pactum. Paying interest on a bond is no admission of sufficient assets to pay the principal, nor is mere submission to arbitration; though a submission of the question of assets in his hands and an award against him would be conclusive against him in that litigation, but not with any other creditor. This is a brief summary of the English cases.

The leading case on this subject is Rann v. Hughes, 7 Brown's P. C. 556. 7 T. R. 350, note. The declaration stated an indebtedness by the defendant's intestate, his death, leaving sufficient assets, the granting administration to the defendant, the liability of the defendant, and in consideration thereof, his promise to pay. The defendant pleaded the general issue, plene administravit, and plene administravit præter. On the trial, the first issue was found for the plaintiff and the others for the defendant. After verdict, it must be taken for granted that the promise was proved to be in writing. That case was therefore the same in principle as this. In the King's Bench, judgment was given for the plaintiff, but that judgment was reversed in the Exchequer Chamber, and the latter judgment affirmed in the House of Lords. A question was there submitted to the judges, whether a sufficient consideration appeared in the declaration. Ch. Baron Skinner delivered the opinion of the judges at length, in which, among other things, he stated that every man by the law of nature is bound to fulfil his engagements; but the law of England affords no remedy to compel performance of an agreement without sufficient consideration. The fact that the promise is in writing does not supersede the necessity of proving a consideration. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, that forbearance will constitute a sufficient consideration; but if one promise to pay upon request what he was liable to pay upon request in another right, no advantage or convenience is gained by the promissor to constitute a consideration for such promise. In the case of Trevivian v. Hewell, Cro. Eliz. 91, the point decided is, that if an executor having sufficient assets promises to pay, the fact of his having sufficient assets is sufficient consideration for the promise. The cases of Atkins v. Hill and Hawks v. Saunders, Cowp. 284, 289, both support the doctrine that a promise by an executor to pay a legacy, founded upon the fact of his having assets, is a valid promise. Such, I apprehend, is the doctrine of all the cases. In an action against him in the character of executor, to recover a demand out of the testator's estate, a promise by the executor is a mere nudum pactum if there be no assets. 1 Saund. 210, n. 2 Comyn on Contr. 431, concludes an examination of the cases on this point, by saying that though the executor promise upon sufficient consideration, yet by the statute of frauds, the promise, to be valid, must be in writing; but a bare promise to pay by an executor does not make him liable to pay out of his own estate, but he is chargeable only as executor and to the extent of assets in his hands, as he would have been if no such promise had been made; and it makes no difference that such promise is in writing. The cases which have been referred to shew, 1. That every promise require a sufficient consideration to support it; 2. That the promise of an executor to pay absolutely and to bind him personally, not only requires a consideration, but the promise, to be binding, since the statute of frauds, must be in writing;

3. That sufficient assets in the hands of an executor constitute a sufficient consideration for such promise; and 4. That forbearance to sue is also a sufficient consideration. Assuming these principles to constitute the law of this case, had the plaintiffs any right to recover? The defendants had given a promissory note, which, since the statute of Anne, imports a consideration so far as to relieve the plaintiff from stating any consideration in his declaration, or proving any in the first instance; but it is well settled, as between the parties to a note, that the consideration may be inquired into, and if the defendant shews a want of consideration, the plaintiff cannot recover.

In the case of Ten Eyck v. Vanderpoel, 8 Johns. (N. Y.) 120, the defendant, as administrator, promised to pay the amount of the note for value received, by J. B. and his heirs; it was held on demurrer that there was no consideration for the promise. And in Schoonmaker v. Roosa, 17 Johns. (N. Y.) 304, it is expressly adjudged, that between the original parties the consideration of a promissory note may be inquired into; and if there is a want of consideration, the note cannot be enforced at law. In this case the defendants offered to prove that they had no assets except what had been applied, and therefore there was no consideration for their promise beyond the amount which had been paid. In the case last cited it was also decided by this court that a promise by an executor to pay is not binding, unless he has assets, and that a note given by executors by way of submission to arbitration, was not binding, unless there were assets in the executor's hands. When a submission has been made by bond, the executor is liable, not only because a seal imports a consideration, for a promissory note imports a consideration also, but also because when a person has executed an instrument under seal, he shall not be permitted to disprove the consideration. Both the bond and note import assets, and of course a sufficient consideration; the consideration of the bond cannot be explained; that of the note may, as between the original parties and all parties having notice of the consideration. The defendants in this case having shewn, or what is the same thing on this motion, offered to shew, that they had fully administered, and had no assets in their hands, there was no consideration for their promise; "for such promises," says Lord Hardwicke, "must be understood with reference to assets, otherwise men might be drawn in." I Ves. Sr. 126. From the offer in this case it is apparent that the plaintiffs do not stand in a situation to exclude the question of consideration; they are endorsees of the note, but the note being endorsed for the accommodation of Topping originally, and the debt being his, the transaction was between the plaintiffs and Topping; they paid no value for the note to Rawson, the endorser.

The question of forbearance does not properly arise on this record. No such consideration was shown, and the court cannot infer it from the fact that the note is payable sixty days after date.

It was contended, upon the argument, that this was like the case of

a guardian who gave a note for his ward, and was holden personally responsible, on the ground that the debt of the ward was discharged by the guardian's note. The case of Thatcher v. Dinsmore, 5 Mass. 301, 4 Am. Dec. 61, was cited to support the proposition. In that case the defendant as guardian to A. L., an insane person, promised to pay the plaintiff a certain sum of money. The notes were given for just debts of the ward, and the defendant was his guardian. After the notes were payable, and before suit was brought, A. L. was restored to his reason, and the defendant discharged from his guardianship. There was a verdict for the plaintiff, subject to the opinion of the court. That opinion was pronounced by Chief Justice Parsons. It had been objected on the argument that there was no consideration for the promise; in answer to which, the learned judge says that the notes were given for a debt which the defendant was bound to pay, if he had assets, which it was not denied he had; that a note for value received was a promise for a legal consideration, though as between the original parties the promissor might shew that none was received. And he says it has long been settled as law in that state, that a negotiable note given for a simple contract debt extinguishes such debt. He therefore argued that the defendant was liable, as by his note the plaintiff's debt against the ward was discharged. That case is no authority here, because the reasons are not applicable. A promissory note given in this state for a simple contract debt does not absolutely discharge such debt; the creditor may still prosecute upon the original consideration, and may recover upon producing and canceling the note. In that case also it appears that the defendant had assets. In the case now under consideration the plaintiff lost nothing by taking the defendant's notes for the note of their intestate; they might at any time have prosecuted the defendants as administrators for the money lent to their intestate, and recovered judgment, and thus have obtained any preference which the law would then have given them.

On the whole case, therefore, I am of opinion that the facts offered in evidence were a bar to a recovery against the defendants in their individual capacity, and that a new trial should be granted.†

THOMPSON v. GRAY.

(Supreme Judicial Court of Maine, 1874. 63 Me. 228.)

Assumpsit upon a note given by the defendant to the plaintiff for $190, dated August 17, 1872. A brief statement was pleaded with the general issue, admitting the signature to the note, but saying that

† Accord: Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436 (1906); Gansevoort Bank v. Gilday, 53 Misc. Rep. 107, 104 N. Y. Supp. 271 (1907). See Batterman v. Butcher, 95 App. Div. 213, 88 N. Y. Supp. 685 (1904); Crofts v. Beale, 11 C. B. 172 (1851).

it was without any valid legal consideration; that, at the time of its execution, Mrs. Gray was in a feeble and impaired condition of body and mind, and was mentally incompetent to transact business with intelligence, understanding rationally what she was doing; and that the plaintiff procured her signature by artifice, deception and fraud.

The note was given to take up one of her husband, maturing in the bank, for necessaries supplied to their family by the plaintiff.

There is no occasion to rehearse the testimony as to the issues of fact presented, since no legal questions arose upon that branch of the case.[9]

WALTON, J. The promissory note of a married woman given for the antecedent debt of her husband is not void for want of consideration if it is made payable at a future day. Such a note necessarily operates as a suspension of the right of the creditor to enforce payment of his debt till the note matures; and it is a rule of law, too well settled to require the citation of authorities in support of it, that such a suspension of the right of the creditor to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it. It is not necessary that there should be an express agreement for delay. The taking of a new security payable at a future day, by operation of law, and without any special agreement to that effect, imposes upon the creditor the duty of waiting for his pay till the new security matures. Andrews v. Marrett, 58 Me. 539, and authorities there cited; Eisner v. Keller, 3 Daly (N. Y.) 485.

The objection, therefore, that the note in suit was given without consideration is not sustained.

Nor are we satisfied that, at the time of the giving of the note in suit, the defendant did not have an intelligent understanding of what she was doing. Nor are we satisfied that there was any such fraud or imposition practiced upon her as ought to avoid the note. She probably felt that if there was no legal obligation resting upon her to pay the debt, still, inasmuch as it was incurred for necessaries supplied her and her children as well as her husband, and she alone had the means to pay it, that there was a moral obligation resting upon her which she was not at liberty to throw off; and the fact that she was willing to give her personal obligation to pay for such necessaries is not to our minds evidence of insanity or imposition.

Judgment for the plaintiff.[10]

[9] Arguments of counsel are omitted.

[10] Accord: York v. Pearson, 63 Me. 587 (1874); Fulton v. Loughlin, 118 Ind. 286, 20 N. E. 796 (1888); Murphey v. Illinois Bank, 57 Neb. 519, 77 N. W. 1102 (1899); Balfour v. Insurance Co., 3 C. B. (N. S.) 300 (1857).

In Murphey v. Illinois Bank, supra, the court said: "The effect of this evidence is that Murphey executed the note in suit as an accommodation for Warren & Co. We do not think he executed the note without consideration. The promise of Warren & Co. to repay him what he should pay the bank was a sufficient consideration to support his promise to the bank, and the fact that Warren & Co. failed to keep their promise to indemnify did not release Murphey from his promise to the bank."

If there is a consideration sufficient to support the maker's or indorser's ob-

MARTENS-TURNER CO. v. MACKINTOSH.

(Supreme Court, Appellate Division, First Department, 1897. 17 App. Div. 419, 45 N. Y. Supp. 275.)

INGRAHAM, J. The action was brought to recover upon two causes of action. The first was a cause of action for goods sold and delivered; and the second for goods sold and delivered upon a credit, alleging that the credit was obtained by false representations.

The answer of the defendant admitted the sale and delivery of the goods set forth in the first cause of action, alleging the commencement of the action on the 24th day of December, 1894, and that, at the time the said action was commenced, nothing was due from the defendant to the plaintiff, except the amount due on a note of $323.11, and further alleging that the defendant had given to the plaintiff promissory notes for the goods sold and delivered in the cause of action set up in the complaint; that the plaintiff had accepted the said notes, such notes being given in payment, and not otherwise, of the entire amount which was due and owing from the defendant to the plaintiff; and that said notes were not due at the time of the commencement of the action, except the note for $323.11 and denied the allegations of the second cause of action as to the fraud alleged.

Upon motion judgment was entered in favor of the plaintiff for the amount of the promissory note admitted to be due, and upon the trial the court, on motion of the plaintiff, directed a judgment for the balance of the amount claimed to be due, on the ground that the giving by the defendant and the acceptance by the plaintiff of a promissory note for the amount of the sale of such goods was not an extension of the time of payment, but that, notwithstanding the giving and acceptance

ligation, viewed as a simple promise in writing—e. g., an actual promise to forbear to sue upon the debt, whether that of the promisor or a third party, for which the note was given, or a forbearance at the request of the maker or indorser (Mansfield v. Corbin, 2 Cush. 151 [1848]; Russell v. Bassett, 79 Conn. 709, 66 Atl. 531 [1907]. See Strong v. Sheffield, post, p. 271), or an extinguishment of the promisor's or third party's prior indebtedness (Union Bank v. Jefferson, 101 Wis. 452, 77 N. W. 889 [1899]; Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042 [1901], affirmed 173 N. Y. 596, 65 N. E. 1121 [1903]; Bigelow Co. v. Automatic Co., 56 Misc. Rep. 389, 107 N. Y. Supp. 894 [1907]), or the making of advances to the promisor or a third party upon the instrument as collateral security (Black v. Bank, 96 Md. 399, 54 Atl. 88 [1903]; Metropolitan Co. v. Springer [Sup.] 90 N. Y. Supp. 376 [1904]; Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109 [1905]), or the surrender of collateral security at the request of the promisor (Allentown Bank v. Clay Co., 217 Pa. 128, 66 Atl. 252 [1907]), or the giving of a note to the promisor (Milius v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669 [1905])—it has always been held that the maker or indorser is liable on the instrument.

A bill or note, given in payment of a debt barred by the statute of limitations, or by a discharge in bankruptcy, or voidable on the ground of infancy or insanity, is enforced on the same theory as a parol promise. Mull v. Van Trees, 50 Cal. 547 (1875); Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837 (1886); Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788 (1896). And see Eastwood v. Kenyon, 11 Ad. & E. 438 (1840). Compare Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436 (1906).

of the notes in payment of the indebtedness, which notes were not due at the time of the commencement of the action, the plaintiff could at any time maintain an action to recover the price of the goods sold and delivered.

The counsel for the respondent refers to but one authority as justifying the decision of the court below, viz., Graham v. Negus, 55 Hun, 440, 8 N. Y. Supp. 679. That case is opposed to a long line of authorities in this state (including decisions of the Court of Appeals upon the exact point), in England and many of the other states. The rule is stated in 18 Am. & Eng. Enc. Law, p. 177, as follows: "The taking of a note for a debt, whether such note is negotiable or not, operates to suspend the right of the creditor to sue on the original cause of action until after the maturity of the note;" and the cases to which reference is made in the note amply sustain this proposition. It was expressly applied by the Court of Appeals in this state in the cases of Happy v. Mosher, 48 N. Y. 313, and Hubbard v. Gurney, 64 N. Y. 457. Whether, upon this allegation in the answer, the acceptance of the note was an extinguishment under the original obligation to pay for the goods sold and delivered, it is not necessary to determine. At least the acceptance of the notes was a suspension of the right to sue for the amount due upon the original cause of action for goods sold and delivered.

The consideration for this suspension of the right to enforce the obligation is apparent. By the execution of the promissory note the debtor places in the hands of the creditor an obligation which imposes upon him a much more onerous obligation than that upon the mere agreement to pay money. By it the creditor has the right to transfer by mere indorsement and delivery the obligation of the debtor, which, in the hands of the indorsee for value before maturity, imposes upon the maker of the note an obligation to pay, regardless of any equities which exist between himself and his original creditor. That this right of transfer to such a third party gives to the creditor an important advantage, and imposes upon the debtor an increased liability, is apparent, and is certainly an ample consideration for an agreement, implied by the delivery of the note, that at least the right to enforce the original obligation should be suspended until a failure to pay the note when due. That this must be so is apparent from the fact that such a right to transfer the note by indorsement exists. Upon such transfer the right to sue upon the original cause of action would be suspended, not only until the note was due, but until the note so delivered had again become the property of the original debtor. To hold that, notwithstanding the giving and acceptance by the original creditor of a note for the amount of the indebtedness, such original creditor could at once commence an action to collect the original indebtedness, would expose such a debtor to a twofold liability in case of the transfer of the note, and would be to allow a violation of a clearly implied agreement for which there was ample consideration. We think it quite clear that,

both upon principle and authority, the giving and acceptance by the creditor of a note for an existing indebtedness at least suspends the right of the creditor to sue on such indebtedness until after the maturity of the note, and that the direction of the verdict was erroneous.

It follows that the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

SISON v. KIDMAN.

(Court of Common Pleas, 1842. 3 Man. & G. 810.)

Debt by the payee against one of two makers of a joint and several note for £15., payable on demand.

The defendant pleaded that the note in the declaration mentioned was and is a promissory note made by the defendant and one Watt; but that neither before nor at the time of making the said note was the defendant liable to the plaintiff for the said sum of £15.; and that the said note was made and signed by the defendant at the request of the said Watt, and for the security to the plaintiff of the said sum of £15., then due and owing from the said Watt to the plaintiff, of which the plaintiff then had notice; and that the defendant never had any value or consideration for the said note.

Replication, that the defendant had value and consideration for the said note, to wit, of the amount of the said note.

General demurrer and joinder.[11]

TINDAL, C. J. When the defendant signed this note he entered into a new and original contract; he took the debt upon himself. It abundantly appears upon the plea that the note was made for a good consideration. I think that Evans v. Jones, 5 M. & W. 295, disposes of all argument upon the subject.

ERSKINE, J. I also think that there is no doubt in this case. A good consideration for the note appears on the defendant's plea; then the case is that of a man who agrees to pay a certain sum on a good consideration.

MAULE, J. The case is wholly free from doubt.

Judgment for the plaintiff.[12]

[11] Arguments of counsel are omitted.

[12] But see Courtney v. Doyle, 10 Allen (Mass.) 122 (1865), Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609 (1872), Hood v. Robbins, 98 Ala. 484, 13 South. 574 (1893), and Remington v. Detroit Co., 101 Wis. 307, 77 N. W. 178 (1898), in which cases the accommodation party signed after the delivery of the instrument.

STRONG v. SHEFFIELD.

(Court of Appeals of New York, 1895. 144 N. Y. 392, 39 N. E. 330.)

Appeal from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made December 12, 1892, which reversed a judgment in favor of defendant, entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action upon a promissory note. The facts, so far as material, are stated in the opinion.[13]

ANDREWS, C. J. The contract between a maker or indorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is nudum pactum. The law governing commercial paper, which precludes an inquiry into the consideration as against bona fide holders for value before maturity has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and indorsed by her at his request, and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's indorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto.

Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes, in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. Morton v. Burn, 7 Adol. & E. 19; Wilby v. Elgee, L. R. 10 C. P. 497; King v. Upton,

[13] Arguments of counsel are omitted.

4 Greenl. (Me.) 387, 16 Am. Dec. 266; Leake, Cont. p. 54; Reynold v. Padelford, 2 Am. Lead. Cas. p. 96 et seq. and cases cited.

The general rule is clearly, and in the main accurately, stated in the note to Forth v. Stanton, 1 Saund. 210, note b. The learned reporter says: "And in all cases of forbearance to sue such forbearance must be either absolute or for a definite time or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that, in the absence of a specified time, a reasonable time is held to be intended. Oldershaw v. King, 2 Hurl. & N. 517; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593.

The note in question did not in law extend the payment of the debt. It was payable on demand, and although, being payable with interest, it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 243; Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff): "I will hold it until such time as I want my money. I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant indorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time, or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation, with costs in all courts.[14]

[14] Accord: Hover v. Magley, 48 Misc. Rep. 430, 96 N. Y. Supp. 925 (1905). But a negotiable instrument payable on demand, signed by the debtor and delivered by him to his creditor on account of the debt, is enforceable by the payee against the debtor. Stevens v. Park, 73 Ill. 387 (1874).

GROCERS' BANK OF CITY OF NEW YORK v. PENFIELD et al.

(Court of Appeals of New York, 1877. 69 N. Y. 502, 25 Am. Rep. 231.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, reversing a judgment in favor of defendants, entered upon the report of a referee (reported below, 7 Hun, 279).

This action was upon two promissory notes, on which defendants Penfield and Stone were makers, which were made payable to defendant Truax, and by him indorsed and transferred to plaintiff.

The referee found, in substance, that the notes were executed by the makers without any consideration, were accommodation notes, and were received by plaintiff solely as collateral security for a precedent debt, without any agreement to extend the time of payment of the debt, and thereupon held that plaintiff was not a bona fide holder, and directed judgment dismissing the complaint as to said makers.[15]

RAPALLO, J. We think that the order in this case must be affirmed on the ground stated by Brady, J., in his opinion delivered at General Term. Whatever confusion may have existed upon the point, we think that we may now safely say, in the language of Professor Parsons (1 Parsons on Notes and Bills, 296), that it is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it either in payment or as collateral security for an antecedent debt, and the maker will have no defense. See, also, Story on Bills, § 192, note m, and Story on Notes, § 195, and authorities cited. The existing debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intrusted to the payee, or some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to cut off such equity of the maker. Cole v. Saulpaugh, 48 Barb. 104; Bank of Rutland v. Buck, 5 Wend. 66; Lathrop v. Morris, 5 Sandf. 7.

It has been held by high authority that an antecedent debt is sufficient even in the case of a note fraudulently diverted to constitute the holder a bona fide holder for value without any extension of time or surrender of securities or other new consideration. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. But in this state that doctrine does not prevail. Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389. The leading authorities upon the subject are reviewed in the case of Maitland v. Citizens' Bank, 40 Md. 540, 17 Am. Rep. 620. Whatever difference of opinion may have existed, as to the case of a note diverted

[15] Arguments of counsel omitted.

or fraudulently put in circulation, it must be regarded as settled that an indorsee of a negotiable note made for the accommodation of the indorser, but without restriction as to its use, taking the note in good faith as collateral security for an antecedent debt, and without other consideration, is entitled to the position of a holder for value, and not affected by the defense of want of consideration to the maker.

We should not have deemed it necessary to discuss the point so much at length, but for the reason that it does not appear ever to have been previously expressly adjudicated in this court.

The order should be affirmed, and judgment absolute, etc. All concur.[16]

LOMBARD et al. v. BRYNE et al.

(Supreme Judicial Court of Massachusetts, Suffolk, 1907. 194 Mass. 236, 80 N. E. 489.)

Contract on a promissory note against James L. Bryne as maker and Samuel H. Hellen as indorser. Writ dated August 24, 1905. The note, of which a copy was annexed to the declaration, was as follows:

"$1,000. Boston, Mass., May 22, 1905.

"Three months after date I promise to pay to the order of S. & R. J. Lombard one thousand dollars at any Boston bank with interest.

"James L. Bryne,

"Value received, 55 Bowdoin Ave.

"No. Due ———."

Indorsed: "S. H. Hellen."

The answer of the defendant Hellen contained a general denial, and, among other matters, alleged that this defendant's indorsement was made without any consideration.

In the superior court the case was tried before Bell, J. It appeared that the plaintiffs had sold goods to Bryne to the amount of several thousand dollars, and that Bryne in part payment therefor had given to the plaintiffs two promissory notes for the sum of $1,000 each, one of which matured before the other; that at the maturity of the earlier note a note similar to the one in suit was made by Bryne payable to the order of the plaintiffs and was indorsed by the defendant Hellen, and that the note in suit was given at the maturity of the last-mentioned note in renewal of it.

It was contended by the plaintiffs, and evidence was introduced by them tending to prove, that the note in suit, as well as the note in renewal of which it was given, was indorsed by the defendant Hellen for the accommodation of Bryne, and it was contended by the defendant

[16] Accord: English v. Schlesinger, 55 Misc. Rep. 584, 105 N. Y. Supp. 989 (1907); In re Hopper-Morgan Co. (D. C.) 154 Fed. 249 (1907); Milius v. Kauffmann, 104 App. Div. 442, 93 N. Y. Supp. 669 (1905). Compare In re Hopper-Morgan Co. (D. C.) 156 Fed. 525 (1907).

Hellen, and evidence was introduced by him tending to prove, that the indorsements were solely for the accommodation of the plaintiffs.

The judge, after stating to the jury that, if the indorsement of the defendant Hellen was made for the accommodation of the plaintiffs, defendant would not be liable to them, and that if, on the other hand, the indorsement was made for the accommodation of Bryne, or to help him to get a renewal, the defendant Hellen would be liable to the plaintiffs, further instructed them that the note itself prima facie showed a liability on the part of the defendant Hellen to the plaintiffs, and that to overcome this prima facie liability the burden of proof was upon the defendant Hellen to establish the fact that he indorsed the note in suit for the accommodation of the plaintiffs.

The jury returned a verdict for the plaintiffs against the defendant Hellen in the sum of $1,061.66; and the defendant Hellen alleged exceptions.

KNOWLTON, C. J. The question at the trial was whether, as between the plaintiffs and the defendant Hellen, there was a consideration for Hellen's signature upon the note. The production of the note made a prima facie case on this point, in favor of the plaintiffs. The defendant sought to meet it by showing that the presumption which ordinarily would arise from the form of the note was not well founded, and that there was no consideration for his signing, inasmuch as he affixed his signature merely for the accommodation of the plaintiffs. On the question whether there was a consideration for the note, the burden of proof was on the plaintiffs throughout the trial. The evidence offered by the defendant was on that issue, and was intended to meet and answer the contentions of the plaintiffs. If, on the whole evidence, the matter in dispute was left in an even balance, the plaintiffs would fail.

This is not like a case where the defendant seeks to avoid the effect of prima facie evidence by the proof of an independent fact outside of the issue, whereby he is relieved from liability. In such a case the defendant has the burden of proving the fact, and if he fails, the original prima facie case prevails.

The present case cannot be distinguished in principle from Perley v. Perley, 144 Mass. 104, 10 N. E. 726. See Delano v. Bartlett, 6 Cush. 364; Broult v. Hanson, 158 Mass. 17, 32 N. E. 900; Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

The jury should have been instructed that, on the whole evidence, the burden was on the plaintiffs to prove that the defendant Hellen's indorsement was for a valuable consideration.

Exceptions sustained.[17]

[17] See Bringman v. Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845 (1902).

PART II

NEGOTIATION

CHAPTER I

TRANSFER

SECTION 1.—WHO MAY TRANSFER

STONE v. RAWLINSON et al.

(Court of Common Pleas, 1745. Willes, 559.)

This was an action on a promissory note for fifty guineas made by the defendants dated the 11th of May, 1730, and payable to James Watson or order; and the declaration stated that Watson died on the 1st of April, 1734, intestate, upon whose death administration of his goods and chattels was granted to Ann Webb, who indorsed the note to the plaintiff.

To this declaration the defendants demurred.[1]

WILLES, Lord Chief Justice. * * * The third point, therefore, and the only one which remains to be considered, is whether the executor or administrator of a person, to whom or to whose order a promissory note is made payable, can assign over such note so as to enable the indorsee to bring an action upon it in his own name. And as it was insisted on the one hand that though this has been frequently done by persons concerned in trade yet it had never been controverted before, so it was admitted on both sides that there has never been any judicial determination upon this point either one way or the other. And though several cases were cited as bearing some resemblance to this, I think that none of them were at all material in this case, except the case of Moore and Manning in Comyns, 311, 312, of which I shall take notice presently.

As this is a matter which greatly concerns the trade and commerce of the nation, and as it has never been judicially determined before, we thought ourselves at liberty and that it was the properest method we

[1] The statement of facts is abridged, and a portion of the opinion omitted.

could take to inquire of traders and merchants of undoubted credit what has been the practice in this case ever since the act of the third and fourth of Queen Anne, and how the act has been understood by them. We have done so, and they all agree that it has been the constant practice for executors and administrators to indorse such notes and inland bills of exchange; and that promissory notes when so assigned have always been considered to be as much within the statute, and that they may be put in suit by the indorsees in the same manner as if they had been indorsed by the testator or intestate. As therefore we are fully satisfied that this has been the constant practice, and that the law has been always so understood amongst traders, and as the courts of law have always in mercantile affairs endeavored to adapt the rules of law to the course and method of trade in order to promote trade and commerce instead of doing it any hurt, so we are determined in the present case to make this indorsement valid according to the practice, if we can by any means make it consistent with the words of the act and agreeable to the rules of law. And we think it is easy to do both.

The words of the act, when considered, will I think plainly warrant it, I mean the following words in the first section of the act, "that any person, to whom a promissory note that is payable to any person or his order is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money either against the person signing such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange." What was the practice before and since as to inland bills of exchange we can only learn from the report of merchants, and they unanimously agree that they were always looked upon to be so assignable by executors and administrators as to enable the assignee to bring an action in his own name. And I think this construction agreeable to the plain intent of the act, which is that whereas the assignee of such notes before had certainly an equitable interest, which would enable him to bring an action in the name of the assignor, such equitable interest by the statute was converted into a legal interest, so as to enable the assignee to bring an action in his own name. It must be admitted that the whole interest to the testator or intestate in such notes vests in the executor or administrator; and that before the statute the executor or administrator might have assigned all his right in such notes so as to convey an equitable interest to another, and to enable him to sue in the name of the executor or administrator. In King and Others, Executors of Stevenson, v. Thorn, 1 D. & E. 487, it was holden that if the payee of a bill of exchange indorse it to A. and B. as executors of C., they may declare as such in an action on the bill. If therefore by the statute such equitable interest is converted into a legal one, it follows that since the statute such assignee may sue in his own name. And I think that the case of More and Manning, 5 Geo. I., in this court and reported in Comyns, 311, 312,

which was the only case that was cited, which seems to bear any resemblance to this, plainly warrants this construction. A promissory note drawn by Manning was made payable to Statham or his order; Statham assigned it to A. and A. to the plaintiff; on a demurrer to the declaration, the exception was that the assignment was only to A. not saying to him or order, and therefore he could not assign it to the plaintiff. And to this the Chief Justice at first inclined; but afterwards it was resolved by the whole court that it was good. For if the original note were assignable, it will always remain so; and whoever has the whole interest in the note may assign it as he pleases.

On the strength of this case I think I may make a syllogism, which will be conclusive in the present case. Whoever has the absolute property in a bill made payable to one or his order may assign it as he pleases within the provision of the statute, and such assignee may maintain an action in his own name; the executor or administrator of a person, to whom such bill is made payable, has the absolute property in it, and therefore he may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name; which is the only question that remains to be determined in the present case.

And we being all of that opinion, judgment must be for the plaintiff.[2]

BOLLES v. STEARNS.

(Supreme Judicial Court of Massachusetts, Middlesex, 1853. 11 Cush. 320.)

The auditor submitted to the court whether the defendant was entitled to an item in set-off of $43.92, a balance claimed by him on a note of the following tenor: "Littleton, May 15, 1845. $100. For value received, I promise to pay John P. Reed, or order, one hundred dollars, on demand with interest. Daniel Bolles." The following indorsement was upon said note: "May 23, 1846. Received $74.17 of the within. Joseph P. Reed." And it was also indorsed by him in that name in blank. There was, when said note was given, a person living in the same town with Joseph P. Reed, whose name was John P. Reed; but it was proved that the note was in fact given by said Bolles to Joseph P. Reed, for money lent him by said Reed; that $74.17 was paid by Bolles upon it, and the note was by Joseph P. Reed indorsed to the defendant within two years from its date, for its then value paid by him.

Upon these facts, judgment was entered in the court of common pleas allowing the set-off. The plaintiff appealed to this court.[3]

METCALF, J. * * * The court are also of opinion that the note given by the plaintiff, payable to John P. Reed, or order, and indorsed

[2] Affirmed on writ of error in the Court of King's Bench (M. 20 Geo. II). 2 Str. 1260, 3 Wilson 1, 2 Burr. 1225.

[3] Part of the case is omitted.

to the defendant by Joseph P. Reed, cannot be allowed to the defendant by way of set-off. That note, though given for money lent to the plaintiff by Joseph P. Reed, was made payable, not to him, but to John P. Reed, a person in esse. Now it is certain that the legal interest in that note was not transferred to the defendant by Joseph P. Reed's indorsing his name on it. He was not the payee nor the legal representative of the payee. And a transfer by indorsement can be made in the first instance only by the payee, or by some one claiming in his right, as his executor, administrator, or assignee in bankruptcy or insolvency. Kyd on Bills (1st Am. Ed.) 106, 107. If there had been no such person as John P. Reed, perhaps the note might have been regarded as payable to bearer, and might have been passed to the defendant by delivery, as if it had in terms been made payable to bearer. Of this, however, we give no opinion. But as the note was made payable, not to a fictitious person, but to a person in being, the indorsement of a third person transferred no legal title to it.

If the indorsement and delivery of this note to the defendant by Joseph P. Reed could be regarded as an equitable assignment of it, still the defendant would not be entitled to set it off against the plaintiff's claim on him, because it is not shown that notice of such assignment was given to the plaintiff before this action was commenced. Rev. St. c. 96, § 5. * * *

Set-off disallowed.[4]

ESTABROOK v. SMITH.

(Supreme Judicial Court of Massachusetts, Worcester, 1856. 6 Gray, 570. 66 Am. Dec. 443.)

Action of contract upon a promissory note, made by the defendant, payable to "Estabrook & Richmond, or order," and indorsed by Richmond in his own name, for the purpose of transferring his interest therein to his copartner, Estabrook, the plaintiff. The parties submitted to the decision of the court the question whether this indorsement was sufficient to enable the plaintiff to maintain an action thereon in his own name.[5]

DEWEY, J. We take the rule to be uncontroverted that a promissory note payable "to A. B., or order," cannot be transferred, so as to give a right of action in the name of a holder, not the original party, without an indorsement by the payee. The application of this principle seems to be decisive against the right of the plaintiff alone to maintain this action. The action is brought by Estabrook upon a note made to a copartnership, Estabrook & Richmond, promising them, by the name of their copartnership, to pay them or order a certain sum of money. That this action cannot be maintained by the plain

[4] But see, contra, Patterson v. Graves, 5 Blackf. (Ind.) 593 (1841).

[5] The arguments of counsel are omitted.

tiff, as payee of the note, is obvious; as that would at once present a case where there was an omission to join all the payees as plaintiffs, which would be fatal to the action. The only question, therefore, is whether this note is legally indorsed, so as to enable the plaintiff to maintain the action as indorsee?

The payees of the note are Estabrook & Richmond, who compose a partnership. An indorsement of the note by the payees would therefore be an indorsement by Estabrook & Richmond, and this would correspond with the form of the note, and transfer the same to their indorsee. One partner might properly transfer the note by indorsement, but he must do it by indorsing the partnership name. Anything less than this seems to be an irregularity, and a departure from the legitimate mode of transfer of a negotiable note or bill, payable to the order of a copartnership.

It is not contended that the indorsement by Richmond alone would have been sufficient to authorize an action in the name of a third person as indorsee; but it is urged that such indorsement is sufficient to authorize an action by the other partner, Estabrook, as indorsee. The position taken is that Richmond, by his indorsement, has parted with all his interest, and so vested the entire note in Estabrook. This may be all true as between Richmond and Estabrook, and might be quite sufficient to settle, as between them, to whose use this money was to be held when collected. But the question still recurs as to the effect of such an indorsement as against the maker of the note, and whether it creates the legal relation of indorsee. As already remarked, the present action, if maintainable at all, is maintainable by Estabrook as indorsee of the note. To constitute a legal indorsement, the payees, Estabrook & Richmond, must be the indorsers. But no such indorsement has ever been made. No one has professed to indorse the note in the partnership name. The only indorsement is that of Richmond individually; and although it might be quite competent for the payees, Estabrook & Richmond, in their partnership name, to have indorsed it to Estabrook, yet they have not done so.

We have found no authority for maintaining an action by an indorsee under such circumstances. The case of Goddard v. Lyman, 14 Pick. 268, which seems to be the most favorable case cited to sustain the position taken by the plaintiff, was widely different from the present case. In that case, although the original indorsement was by two only of three payees, and made to the other payee and a third person, yet it was subsequently indorsed by the third payee, and came to the hands of the plaintiff, who instituted the suit with the indorsement of all the payees. That case, upon its facts, does not therefore furnish any precedent for this case, although some of the remarks, as found in the opinion of the court, might seem to indicate a broader doctrine than the case required.

The plaintiff then had leave to amend, on terms, by joining the other partner, and had judgment for the amount of the note.

KAUFMAN v. STATE SAVINGS BANK.

(Supreme Court of Michigan, 1908. 151 Mich. 65, 114 N. W. 863, 18 L. R. A. [N. S.] 630, 123 Am. St. Rep. 259.)

Action by Adelaide Kaufman against the State Savings Bank. Judgment for plaintiff, and defendant brings error. Affirmed.

MONTGOMERY, J. This action is brought for the wrongful taking possession and conversion of a check and draft, each being made payable to the order of the plaintiff and Bernard S. Kaufman, her husband. The transactions which resulted in the giving of each of these items of commercial paper were in all substantial respects identical. The plaintiff was the owner of some furniture in the Sibley Apartments, so called, in the city of Detroit, which were covered by two policies of insurance, one in the Aachen & Munich Fire Insurance Company, and the other in the American Insurance Company of Boston. For some reason, which does not clearly appear, the policies were made payable to Bernard S. Kaufman notwithstanding the ownership of the goods in the plaintiff. A fire having occurred, Bernard S. Kaufman assigned the policies to plaintiff, and deposited the policies with the respective companies. The agent of the first-named company made a draft on the general manager for the amount of the insurance, payable to the order of Bernard S. Kaufman and Adelaide Kaufman. The second-named company, through its agent, made a check payable in the same manner to the order of Bernard S. Kaufman and Adelaide Kaufman. These two pieces of paper were indorsed to defendant by Bernard S. Kaufman in his own name, and also in the name of plaintiff. The latter indorsement was wholly without authority, the draft issued by the first company being purchased outright on these indorsements, the check from the second company being received for collection on the like forged indorsement. Defendant on receiving the fund turned it over to Bernard Kaufman. The circuit judge directed a verdict for plaintiff, and defendant brings error.

It is claimed that no title to the paper ever vested in the plaintiff for the reason that there was no delivery of the same to her. The assignment of the insurance to her was for her benefit and interest, and her assent to the assignment and acceptance of it would be presumed. Thatcher v. St. Andrew's Church, 37 Mich. 264; Bangs v. Browne, 149 Mich. 478, 112 N. W. 1107. The fact that this check and draft were made payable to the two, rendered it, if plaintiff's contention be correct, as secure as it would have been had it been payable to the plaintiff alone, and we see no reason why plaintiff is not in a position to avail herself of the draft and check, if she sees fit, by affirming her husband's receipt of the same, to do so.

The meritorious question in the case is whether the defendant, having purchased this draft on the indorsement of one of two joint payees, and having assumed to collect the check on an indorsement which

turns out to have been a forged indorsement of plaintiff's name, is in position to assert title as against the true owner, or whether, on the other hand, having received the money upon the check and draft, the defendant is accountable to the true owner for the amount of money received. The defendant relies upon the case of Harding v. Parshall, 56 Ill. 219, and other cases, to establish the rule that a debt to two jointly may be paid to either, and, this being so, it is urged that the owner of commercial paper is entitled to demand and receive payment even in the absence of any indorsement at all, and it is sought to reason from this that the indorsement of Bernard S. Kaufman of plaintiff's name had no other effect than to enable Kaufman himself to receive payment through the instrumentality of the defendant.

It is a sufficient answer to this view to say that such was not the transaction. What did happen was that Bernard S. Kaufman, having in possession these two pieces of commercial paper, each of which represented money due to plaintiff individually, sold one piece of paper to the defendant, and put it in the power of defendant to recover from the payor the pay on the other piece on a forged indorsement. This as between plaintiff and Bernard S. Kaufman was a conversion of the property, and unless he was authorized to pass title to the defendant, or vest it with an agency to receive the money on her paper, it was likewise as between the defendant and the plaintiff a conversion of the property. In the same jurisdiction in which Harding v. Parshall was decided it was held by Chief Justice Scofield, in Ryhiner v. Feickert, 92 Ill. 305, 34 Am. Rep. 130, following and citing with approval 1 Daniel, Negotiable Instruments, 684, that, if several persons not partners are payees or indorsees of a bill or note, it must be indorsed by all of them. Either one of the joint payees may authorize the other to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority; but there is no presumption of law that one may indorse for the other. The same rule was laid down in Wood v. Wood, 16 N. J. Law, 428, and we have been unable to find any case which makes for the contrary rule.

This is not the case of receiving payment from the maker by one of two joint payees. It is an attempt to transfer title in one case and create an agency in the other; and, as we have seen, this cannot be done except by indorsement of all to whose order the instrument is made payable. It will, of course, be understood that this is subject to the rule that under the implied authority of one partner he may indorse for his copartner. But that is not the case here.

The judgment will be affirmed.

SECTION 2.—FORM OF INDORSEMENT

ANONYMOUS.

(Court of Queen's Bench, 1703. 3 Salk. 70.)

A bill of exchange was drawn on W. R. for £40. payable to O. W. or order; W. R. accepts the bill, and afterwards O. W., the drawer, indorses part of it to the plaintiff, who brought an action against the acceptor. Adjudged that it would not lie, because, by his accepting the bill, he made himself liable only to one action for the whole, and not to several actions for part of the money.

EAST v. ESSINGTON.

(Court of Queen's Bench, 1703. 7 Mod. 86.)

An action by the indorsee of a bill of exchange against the drawer, declaring upon the custom of merchants, and that A., to whom the bill was made, indorsavit super billam præd. content. billæ præd. to him the plaintiff solvend.

And here it was agreed by the court that "indorsement" is a term known in law, and signifies a writing on the back of a paper or parchment containing another writing.

To this declaration two exceptions were taken in arrest of judgment:

First. That the words of the indorsement were not significative enough to pass the property of the bill to the plaintiff, according to the custom of merchants.

The second exception was: That it appears there were three bills for the same sum, and that whereon the action is brought was the first, and says, "my second or third not paid, pay this my first."

But PER CURIAM. However that matter would have been on demurrer, it will be well after verdict; for if the second or third were paid, there had been no promise at all, for the promise is conditional to pay this, if the second or third be not paid; therefore if the second or third were paid, the jury could not find for the plaintiff. * * *[8]

HOLT, Chief Justice. If a man write on the back of a bill of exchange, "This is to be paid to J. S.," or, "The contents of this bill to be paid to J. S.," and set his hand to it, it will be a good indorsement.

Judgment for plaintiff.

[8] Part of the case is omitted.

BANK OF WILMINGTON v. HOUSTON.

(Superior Court of Delaware, 1833. 1 Har. 225).

Case. Pleas, non assumpsit, payment, discount and the act of limitations.

The plaintiffs declared against Houston as the indorser of three several promissory notes dated the 8th of March, 1832, drawn by Joseph Roberts in favor of Margaret Booth, Peter B. Dulany and Evan H. Thomas respectively, and amounting together to $1,400, and indorsed by these persons respectively, to the plaintiff. Similar notes had been drawn by Roberts in favor of the same persons for the same amounts dated 30th June, which had been indorsed by the payees and also by this defendant. These were renewed on the 8th of March, by the notes declared on in this action, which were indorsed as aforesaid by the payees respectively, but not actually indorsed by Houston, except through the medium of the following agreement, which was offered in evidence with the notes to charge him as an indorser:

"Prom'y notes.

Jos. Roberts to Margaret Booth for $600; dated 30 June, '31, at 60 days.
Same to Peter B. Dulany for $600; "
Same to E. H. Thomas for $400; "

"To Jos. P. Woollaston, Cashier of the Bank of W. & Brandywine:

"Sir: As I live at a distance from the bank, and being an indorser on the above mentioned notes in your bank, I wish to inform the board of directors, through you, that in case it should be found convenient or expedient to renew said notes for the whole sum or any part thereof, I would not wish the drawer to be put to the trouble of finding another indorser, but the directors aforesaid may hereby consider me as bound in any or every renewal of said notes for the whole amount or any part thereof whenever the same may fall due as much so as if I were personally present, and my sign manual indorsed on the said notes, it being understood that the several indorsers, to wit, Margaret Booth, Peter B. Dulany and Evan H. Thomas, are also to renew their indorsements on the several notes. Dated July 18, 1831.

"[Signed] Geo. Houston.

"Witness: J. Wales."

Under this agreement the notes were several times renewed, the last renewal being on the 8th March, 1832, when the notes were given on which the present suit is founded. The declaration was against Houston as an indorser and not on the guaranty.

Plaintiff offered the notes in evidence. Objected to.[7]

CLAYTON, C. J. This action is against Houston as an indorser, and the notes offered in evidence do not themselves show any connection or liability of the defendant. It appears by other evidence that three

[7] Part of the case is omitted.

notes were drawn by Jos. Roberts in favor of certain persons and indorsed by them, and also by Houston to the bank. Houston afterwards made an agreement with the bank in relation to the renewal of these notes. This is an undertaking to indorse, or an agreement to hold himself responsible as an indorser; in either case he is liable, but liable on the agreement. The action should have been on this agreement, specially setting it out; it might have been done in this case by adding a count to that effect. It has been contended that this was an authority given to the bank to indorse these notes for the defendant. We admit that this authority may be made out by inference—by the course of trade, as where a wife was accustomed to indorse for her husband—but here is a written agreement and we cannot go beyond it. It gives no such authority. The party agrees to be bound as much as if he had indorsed the notes, but he does not indorse them nor authorize another to indorse for him. He is not then an indorser, though liable as much as an indorser; but how liable? Not on the notes, for this would make him an actual indorser, but on the agreement. A distinction is taken in the books between the acceptance of a bill drawn and one to be drawn; in the former case it may be by collateral writing, but in the latter, not. Here, this agreement is in relation to notes to be drawn in future; and the case is stronger than that of an acceptor, for the indorser is quasi a new drawer. We are therefore of opinion that the evidence offered is inadmissible in this action. * * *

The plaintiff suffered a nonsuit.[8]

HAINES v. DUBOIS.

(Supreme Court of New Jersey, 1863. 30 N. J. Law, 259.)

On rule to show cause, etc. The issue in this case was tried at the Salem circuit, and a verdict rendered for the plaintiff. The defendant seeks to have the verdict set aside, and a new trial granted, because he was not an indorser of the note sued on, and if an indorser he had no sufficient notice of nonpayment.[9]

WHELPLEY, C. J. The only question made upon the argument was whether Dubois, who was sued as indorser of a note, was duly notified of its dishonor.

The note was made by John W. Wright, payable to the order of Dubois, to secure a debt which he owed to one Thomas Newell. He agreed to give security for the delay of eight months, the time the note had to run, and took the note so made away with him, and brought it back with the name of Dubois written under that of Wright, the maker. It did not appear upon the trial that Dubois refused to

[8] Compare Andrews v. Whitehead (Tex. Civ. App.) 60 S. W. 800 (1901).

[9] The opinions of Ogden and Van Dyke, JJ., are omitted.

indorse the note, but was willing to be a joint maker. No evidence was given to show why he did not indorse his name, as usual, on the back, instead of writing it, as he did, on the face. Dubois was sworn upon the trial, and did not pretend that he did not intend to indorse the note. He knew that the note was payable to his order, and could not be negotiated without his indorsement, and with this knowledge put his name upon it. It was a sufficient indorsement.

If the payee write his name on any part of the note with the intention of indorsing it, it is a sufficient indorsement. An indorsement, as the word imports, is usually put upon the back of a note; that is the regular mode, but the place where written is by no means essential. Partridge v. Davis, 20 Vt. 499–503.

In Rex v. Biggs, 3 P. Wms. 419–428, it was held, under a statute making it a felony to alter or erase an indorsement on a bill or bank note, that a defendant, who had erased with lemon juice a receipt for part payment written on the face of a bank note, was properly convicted under the act for erasing an indorsement.

This is much like the question of how the indorser's name must be written. It has been held that a writing in pencil is sufficient; so an indorsement by initials, and even by figures has been held good. Brown v. Butchers' Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755, and cases there cited; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 445. The true rule is stated by Nelson, C. J., in the case cited from 6 Hill, 443, that a person may become bound by any mark or designation he thinks proper to adopt, provided he uses it as a substitute for his name, and he intends to bind himself. For the same reason, the place where the name, or mark, or designation is put is not material, if the signer intended it as an indorsement.

The notary, misled by the place in which he found Dubois' signature, sent notice to him as the maker of the note. This notice Dubois, on the trial, admitted he had received, and did not deny that he was fully apprised by it that the note was duly presented for payment at the Salem Bank, where it was payable, payment demanded of the maker, and refused. A short time before the note became due he called upon the plaintiff, to whom Newell transferred it when made, asked to see it, saw it, and remarked that it was correct.

He was not indorser upon any other note at the time with which this might have been confounded. In short, the case leaves no room for doubt that he was fully apprised by the notice of the dishonor of the note, and by fair implication, that he was looked to for payment. The notice in fact answered all the purposes for which a notice is required to be sent to an indorser. This was held sufficient in Howland v. Adrain (decided at June term, 1862) 30 N. J. Law, 41.

No exception was taken in the defendant's brief to the place where the notice was sent.

The verdict was right upon the evidence, and there should be judgment for the plaintiff.

SEARS v. LANTZ & BATES et al.

(Supreme Court of Iowa, 1878. 47 Iowa, 658.)

Action against the defendants Lantz & Bates as makers, and John Bowman as indorser, of a negotiable promissory note. A demurrer having been sustained to so much of the petition as sought to charge Bowman as indorser, the plaintiff appeals.

SEEVERS, J. The note was payable to the defendant Bowman or order, and he wrote on the back thereof the following: "December 18, 1876. I hereby assign all my right and title to Louis Meckley. John Bowman." The ground of demurrer was in substance that no cause of action existed against the defendant, Bowman, under and by virtue of the said writing. Without doubt it amounts to an assignment of all the defendant's right and title in the note. Does this subject him to the liabilities of an indorser? is the question for determination. An indorsement differs from an assignment, in that an indorsee may bring the action in his own name, and an assignee cannot. 2 Parsons on Notes and Bills, 1.

It was held in McCarty v. Clark, 10 Iowa, 588, that the assignment of a promissory note as collateral security for the payment of another debt passed the title to the indorsee, and that he could sue in his own name without averring or showing that the indebtedness secured by the note had been paid.

In Childs v. Davidson, 38 Ill. 438, it was held that "I guarantee the payment of the within note" amounted to an assignment, and transferred the legal title to the note so as to enable the holder to maintain an action against the maker. See, also, Rowe v. Haines, 15 Ind. 445, 77 Am. Dec. 101.

In Sands v. Wood, 1 Iowa, 263, it was held the words "I assign the within note to Miss Sarah Coffin" amounted to an indorsement, and the party so transferring the note became liable as an indorser.

The effect of the assignment in Sands v. Wood was to assign and transfer whatever title the assignor had in the note. He used no words that in and of themselves indicated that he bound or made himself liable in case the maker after demand failed to pay the note. But it was held the law as a legal conclusion attached to the words used the liability that follows the indorsement of a promissory note.

It will be difficult, we apprehend, to draw a distinction between that case and the one at bar. Here the defendant assigned all his right and title in the note, and this in legal contemplation was the effect of the assignment in Sands v. Wood.

In neither case was there any limit attached to the liability of the assignor. That resulted as a legal conclusion. It must be regarded as settled in this state that the assignment of a promissory note by the payee thereof, in writing on the note, vests the legal title therein in the assignee, so as to enable him to bring an action in his own name

against the maker. Such being true, an assignment amounts to an indorsement, and makes the assignor liable as an indorser, within the rule laid down by Parsons, above cited.

The result is the demurrer should have been overruled.

Reversed.

CENTRAL TRUST CO. v. FIRST NAT. BANK.

(Supreme Court of the United States, 1879. 101 U. S. 68, 25 L. Ed. 876.)

STRONG, J. This case, as made by the bill, answers, replications, and proofs, is as follows: On the 24th day of September, 1874, the First National Bank of Wyandotte, Kan., made its promissory note at Chicago, Ill., in these words:

"$5,000. Chicago, Illinois, Sept. 24, 1874.

"Four months after date we promise to pay to Cook County National Bank, of Chicago, or order, five thousand dollars, with interest at the rate of ——— per cent. per annum after due, value received, all payable at Cook County National Bank. B. Judd,

"Cashier 1st Nat'l Bank, Wyandotte, Kas.

"$6,000 Wyandotte Co. and City bonds as collateral."

The note was made and delivered to the Cook County Bank, in pursuance of an arrangement between that bank and Judd, the cashier of the Wyandotte Bank, by which it was agreed the latter should execute a four months note for $5,000, with security, and have the same discounted by the Cook County Bank, and the proceeds placed to the credit of the Wyandotte Bank, but not to be drawn against so as to reduce the credit for such proceeds below $4,000—such note to remain with the Cook County Bank, and to be surrendered to the maker on the renewal or close of the account. It was distinctly understood between the officers of the two banks when the note was given that it should be held by the Cook County Bank as a memorandum, and not be negotiated or separated from the Wyandotte city and county bonds for $6,000 accompanying it, which were delivered contemporaneously with it as collaterals. Accordingly, the sum of $4,000, part of the proceeds of the discount, was suffered to remain on deposit to the credit of the Wyandotte Bank until the Cook County Bank failed, became insolvent, and passed into the hands of a receiver. At the time of such failure and the appointment of a receiver there was also an additional credit of $868 due from the Cook County Bank to the Wyandotte Bank. When, therefore, the note matured there was due from the payee to the maker of the note the sum of $4,868. But before its maturity, to wit, on the 7th day of October, 1874, the Cook County Bank, in violation of its agreement above mentioned, passed the note to the New York State Loan & Trust Company, by which it was discounted, without any knowledge of any defense which the Wyandotte Bank had against it, or any knowledge of the origin of

the note and of the agreement between the two banks, other than what the face of the note revealed.

The note was protested when it fell due, and it is now held by the Central Trust Company of New York, the receiver of the New York State Loan & Trust Company, and the collaterals, the municipal bonds, are held still by the Cook County Bank.

This bill has been filed to compel its surrender and the surrender of the Wyandotte city and county bonds on the payment of $132, the difference between $5,000 and $4,868, the sum standing to the credit of the Wyandotte Bank against the payee; the claimant offering to pay that sum.

In view of these facts, fairly deducible from the evidence, it is manifest that, as between the complainant and the Cook County Bank, there is a perfect defense against the note to the extent of $4,868, the sum standing to the credit of the Wyandotte Bank due from the payee. On the payment of $132 the maker of the note has a clear equity to have it surrendered, together with the municipal bonds held as collaterals.

But it is claimed that the trust company, having received the note before its maturity, and having discounted it in the usual course of business without any knowledge of any equities or defense against it, is entitled to hold it free from any defense which the maker could set up against the payee; that is, against the Cook County Bank.

A large portion of the argument before us has been expended upon the questions whether, inasmuch as the note was given by the cashier of the Wyandotte Bank at Chicago, and was made payable at a future day, it was not void under the general banking law. We pass those questions as unnecessary to be considered. If it be conceded that the note was valid at its inception, it is certainly true the maker had a good defense against it while it was in the hands of the payee, and we do not perceive that the manner in which the trust company or its receiver obtained it puts them or either of them in any better position than the payee occupied.

The note was not indorsed to the trust company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the trust company would hold it unaffected by any equities between the maker and the payee. But instead of an indorsement, the president of the Cook County Bank merely guaranteed its payment, and handed it over with this guaranty to the trust company. The note was not even assigned. There was written upon it only the following:

"For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at 10 per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same. B. F. Allen, Pres't."

In no commercial sense is this an indorsement, and probably it was not intended as such. Allen had agreed that the note should not be negotiated, and for this reason perhaps it was not indorsed. That a guaranty is not a negotiation of a bill or note, as understood by the law merchant, is certain. Snevily v. Ekel, 1 Watts & S. (Pa.) 203; Lamourieux v. Hewit, 5 Wend. (N. Y.) 307; Miller v. Gaston, 2 Hill (N. Y.) 188. In this case, the guaranty written on the note was filled up. It expressed fully the contract between the Cook County Bank and the trust company. Being express, it can raise no implication of any other contract. "Expressum facit cessare tacitum." The contract cannot, therefore, be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract. 2 Parsons, Notes and Bills, 46 et seq., notes.

At best, therefore, the defendants below can claim no more or greater rights than those of the Cook County Bank, and the complainants are entitled to a return of the note and of the collaterals on payment of the sum of $132.

Decree affirmed.[10]

HATCH v. BARRETT et al.

(Supreme Court of Kansas, 1885. 34 Kan. 223, 8 Pac. 129.)

Action by Phillip Barrett and another to have a note signed by him as maker and a mortgage given to secure the same canceled on the ground that the note and mortgage had been secured by the payee by duress. The defendant Hatch answered, by way of defense and cross-petition, that he was a purchaser for value of the note and mortgage from the payee without notice of the duress. Judgment for the plaintiffs.[11]

HORTON, C. J. * * * Between the parties to the original transaction, of course, the payment of the note could not be enforced in the courts. It is claimed, however, by Charles B. Hatch that he is entitled to hold the note and mortgage free from any defense which the makers could set up against the payee, upon the ground that he purchased the note for a valuable consideration before its maturity, in the usual course of business, without the knowledge of any equities or defense

[10] Accord: Belcher v. Smith, 7 Cush. (Mass.) 482 (1851). Contra: Partridge v. David, 20 Vt. 499 (1848); National Bank v. Galland, 14 Wash. 502, 45 Pac. 35 (1896); Donnerberg v. Oppenheimer, 15 Wash. 200, 46 Pac. 254 (1896); Kellogg v. Latham, 58 Kan. 43, 48 Pac. 587 (1897).

[11] The statement of facts is written by the editors. Part of the opinion is omitted.

against it. He asserts himself to be a bona fide owner of the note and mortgage for value. The following is the writing upon the back of the note, of the date of July 23, 1881:

"State of Arkansas, County of Washington—ss.: I, James C. Rogers, do hereby assign the within note to Charles B. Hatch, of Osage county, Kansas. Said assignment is made without recourse on me, either in law or equity. J. C. Rogers.

"Signed in the presence of H. F. Raymond, Clerk Co. Court, Washington County, Arkansas."

The question is, whether this writing can be considered in a commercial sense an indorsement. If the note was not "indorsed" to Hatch, it was not taken by him in the usual course of business by the mode of transfer in which negotiable paper is usually transferred. "A negotiable promissory note, if payable to 'order,' can be assigned free from all equities only by indorsement, for there is no statute in this state that authorizes a negotiable promissory note, payable to 'order,' to be transferred free from all or any equitable defenses or claims, except by indorsement." Comp. Laws 1879, c. 14, § 1; McCrum v. Corby, 11 Kan. 464.

The alleged indorsement is clearly not in the usual or common form, but substantially different therefrom. The words of the indorsement, taken together, must be treated as only an assignment of the note. An assignee stands in the place of the assignor, and takes simply an assignor's rights; but the assignment of a note will not cut off the defenses of the maker. Trust Co. v. Bank, 101 U. S. 68, 25 L. Ed. 876; Bank v. Walker (C. C.) 2 McCrary, 565, 5 Fed. 399. We think it will be conceded that if there were only written upon the back of the note the following words: "I, James C. Rogers, do hereby assign the within note to Charles B. Hatch, of Osage county, Kansas"—that such writing would not be considered an indorsement in a commercial sense. We do not think the additional words written upon the back, to wit, "Said assignment is made without recourse on me, either in law or equity," alter or change the legal rights of the parties under the written assignment, and all of the writing must be treated as merely an assignment of the note. Daniel, Neg. Inst. §§ 666, 667, 688, 701; Martin v. McMasters, 14 La. 420; Hailey v. Falconer, 32 Ala. 536; Vincent v. Horlock, 1 Camp. 442.

Of course, we understand that an indorsement qualified by the words "without recourse" is not out of due course of trade, and does not throw any suspicion upon the character of the paper. A note continues negotiable, notwithstanding the words "without recourse"; but in this case, the indorsement goes further than the mere words "without recourse," and therefore, as before stated, we cannot consider the writing by which the note was transferred as an indorsement in a commercial sense. If parties accept paper with the indorsement "without recourse," with the expectation that the paper is negotiable, the indorsement ought to be made in strict compliance with the technical rules of

commercial law, in this way: "Without recourse. John Doe;" or "Pay to Richard Roe, or order, without recourse. John Doe;" or in some other like form.

This disposes of the case, as, upon the foregoing conclusion, the judgment of the district court must be affirmed. * * *[12]

THORP v. MINDEMAN.

(Supreme Court of Wisconsin, 1904. 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.)

See ante, p. 96, for a report of the case.

EVANS v. FREEMAN.

(Supreme Court of North Carolina, 1906. 142 N. C. 61, 54 S. E. 847.)

Plaintiff sued upon a bond, dated June 6, 1899, by which the defendant promised to pay to David A. Askew on November 15, 1900, the sum of $50, being the purchase money for the right to sell an automatic stock feeder in Hertford county. The bond was transferred to the plaintiff by the following indorsement: "For value received, I herewith transfer and assign all my right, title and interest in and to the within note to J. D. Evans, July 1, 1899. [Signed] D. A. Askew."

The defendant's counsel requested the court to charge the jury as follows: "The transfer on the back of the note is not such an indorsement as raises any presumption in favor of the holder of the note, and one who took it with such an indorsement holds it subject to the condition on which it was held by the original payee as to offsets and equities." The court refused to give the instruction, and the defendant excepted.[13]

WALKER, J. * * * There is one other matter which requires some attention. The defendant contended that the plaintiff was not a holder in due course, because by the terms of the indorsement he was put on notice of any and all equities and defenses of the maker as against the payee, Askew, the reason being that only the right and title of the payee was transferred and the indorsee acquired no better title under such an indorsement than his indorser himself had, but, ex vi termini, only his right and title, which were subject to the defense set up in this action. There was at one time very strong and convincing authority for such a position (Aniba v. Yeomans, 39 Mich. 171), and there was much also said against it (1 Daniel, Neg. Inst. [5th Ed.] § 688c). But we think the controversy has finally been settled by the

[12] Accord: Fox v. Cipra, 5 Kan. App. 312, 48 Pac. 452 (1897).

[13] Only the part of the case relevant to this exception is given.

"Negotiable Instruments Law" as recently adopted. Revisal 1905, c. 54.

Ours is a qualified indorsement, under Revisal 1905, § 2187, and while the indorser is constituted a mere assignor of the title to the instrument, it is provided that such an indorsement shall not impair its negotiability. A qualified indorsement may, by the express terms of that section, be made by adding to the indorser's signature the words "without recourse," or any words of similar import. It has been settled in commercial law that a transfer by indorsement of the "right and title" of the payee or an indorser to a negotiable note is equivalent to an indorsement "without recourse," and words such as were used in this case are therefore in their meaning or "import" similar to such an indorsement, and this is their reasonable interpretation. 1 Daniel, supra, §§ 700, 700a; Norton on Bills & Notes (3d Ed.) 120; Hailey v. Falconer, 32 Ala. 536; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129; Randolph, Com. Paper (2d Ed.) §§ 721, 722, 1008; Goddard v. Lyman, 14 Pick. (Mass.) 268; Borden v. Clark, 26 Mich. 410; Eaton & Gilbert on Commercial Paper, § 61.

However the law may have been, it is now true, as it appears from the statute and the authorities just cited, that such an indorsement does not in law discredit the paper or even bring it under suspicion, nor does it in any degree affect its negotiability. The indorsee is supposed to take it on the credit of the other parties to the instrument (Revisal 1905, § 2187), though the indorser may still be liable on certain warranties specified in the statute. Revisal 1905, § 2214. This conclusion we believe to be in accord with the intention of the Legislature in enacting the negotiable instruments law, as the leading purpose was to afford as much protection to the holders of commercial paper as is consistent with a just regard for the rights of other interested parties, and, by freeing its transfer of unnecessary fetters, to promote its easy circulation and to give it greater currency as a medium of exchange.[14]

GERMANIA NAT. BANK OF MILWAUKEE v. MARINER.

(Supreme Court of Wisconsin, 1906. 129 Wis. 544, 109 N. W. 574.)

WINSLOW, J. The plaintiff sued the appellant and the Northwestern Straw Works as makers of the following promissory note:

"Milwaukee, January 6, 1905.

"Four months after date the Northwestern Straw Works promise to pay to the order of F. G. Bigelow ($20,000) Twenty Thousand Dollars at the First National Bank, Milwaukee. Value received.

"The Northwestern Straw Works,
"E. R. Stillman, Treas.
"John W. Mariner."

[14] Accord: Spencer v. Halpern, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120 (1896), action against indorser.

The defendants answered jointly, alleging that the note was the note of the Northwestern Straw Works (a corporation) alone, and was signed by Mr. Mariner as secretary of the corporation and not in his individual capacity. The case was tried without a jury, and the evidence showed without dispute that the plaintiff purchased the note from the payee in due course and for value before due; that it represented a loan made to the corporation defendant alone; that the by-laws of the corporation required its notes to be signed by two officers, either the president or treasurer and the secretary; that Mr. Stillman was the treasurer of the corporation and Mr. Mariner the secretary; that Mr. Mariner signed his name thereto simply for the purpose of making it the note of the corporation and not intending to bind himself, but neglected to add the word "Secretary" to his name; that the plaintiff had no information as to the capacity in which Mr. Mariner signed the note further than that afforded by the note itself; and that the defendant corporation went into bankruptcy after the maturity of the note and made a composition with its creditors under which there was paid to the plaintiff on the note $4,020. There was no proof that the corporation had ever held out to the plaintiff or the public that Mr. Stillman or any single officer had authority to execute notes for it. Upon these facts the court, upon motion, ordered the complaint amended so as to charge Mr. Mariner as indorser, found him liable as such, and entered judgment against him for the balance due upon the note, from which judgment Mr. Mariner appeals.

The question as to the liability of Mr. Mariner under the facts stated is certainly not free from difficulty. The general rule is well supported that when it clearly appears, either in the body of the note or by appropriate words added to the signatures themselves, that a corporation is the party making the promise, there is no individual liability on the part of the signers. 1 Randolph, Comm. Paper (2d Ed.) § 135. In an early case in this state, however (Dennison v. Austin, 15 Wis. 334), this principle was in effect modified, as it is modified in some other jurisdictions, by a proviso to the effect that, if the signers in fact had no authority to bind the corporation, they bind themselves individually. The negotiable instrument law (chapter 356, p. 682, Laws of 1899) recognizes both the general principle and the proviso, in section 1675—20 (page 694), in these words: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized."

As it appears without dispute in the present case that the signers of the note were authorized to execute it on behalf of the corporation, the proviso need not be considered. In the present case the body of the note declares that the "Northwestern Straw Works" (presumably a corporation) is the promisor. It does not say "I" or "we" promise to pay, but specifically names a corporation as the promisor. Hence,

so far as Mr. Stillman is concerned, the note itself makes it clear that he signed only on behalf of the corporation. Parol evidence would not be admissible to show that he signed as a joint maker. Liebscher v. Kraus, 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496, 17 Am. St. Rep. 171. The same claim is forcibly made as to the signature of the defendant Mariner, and it is not without authority to support it. Shaver v. Ocean Mining Company, 21 Cal. 45.

We are not inclined, however, to rest the case upon any doubtful proposition. Granting that the section does not apply as to the signature of Mr. Mariner, we think it would be conceded that upon its face it is ambiguous so far as Mr. Mariner is concerned. The instrument says that the "Northwestern Straw Works" promises to pay. The signature of Mr. Mariner is the bare signature of an individual. This is certainly not usual, and should arrest the attention of any one dealing with it at once. People do not ordinarily sign contracts purporting on their face to be contracts of others. If they do, the fact itself suggests at once a doubt as to what they mean by it. In other words, the instrument becomes, as to such signatures, ambiguous.

The negotiable instrument law, before referred to, contains several provisions with reference to the construction of negotiable instruments bearing the signatures of persons who have not made their intentions clear, and these must be considered. Subdivision 6, § 1675—17, p. 693, provides that, "where a signature is so placed on an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." This provision, by its very terms, applies only to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or an indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to settle a doubt fairly arising from the ambiguous location of the name, and applies to no other.

In the present case there is no doubt of this nature. The signature of Mr. Mariner is placed in the usual and proper, in fact the only proper, place for a maker. The doubt arising is not a doubt whether he intended to sign as maker, indorser, or guarantor, for it is clear from the location of the name that he did not intend to sign as indorser or guarantor, but simply a doubt whether he intended to sign in an individual or in a representative capacity as maker. To say that, where it conclusively appears from the instrument that the signer intended to sign as a maker, the statute is intended to make him an indorser, would be little short of ridiculous. The statute was passed to meet a case where it is doubtful from the instrument whether a man intended to become an indorser, not to make an indorser out of a person who, without doubt, intended to sign as maker, either individually or as

representative of another. We have no doubt, therefore, that this section has no application to the present case.

Sections 1677—3 and 1677—4, c. 356, p. 712, Laws of 1899, are also referred to as having some bearing on the question. Section 1677—3 provides that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 1677—4 provides that, "where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an indorser in accordance with the following rules," etc. As to the last-named section, it is manifest that it has no application, because Mr. Mariner did not place his signature upon the note in blank. The first-named section is equally inapplicable, because it is certain, from the instrument itself, that he placed his signature thereon as maker, either individually or in a representative capacity; hence the contingency named in the section has not arisen. It seems entirely clear from the language of these two sections, and from the notes thereto, that they were intended to lay down in statutory form the propositions already decided by this court in Cady v. Shepard, 12 Wis. 639, and King v. Ritchie, 18 Wis. 554, and other cases following them. There are no other sections of the negotiable instrument law which can be reasonably claimed to have any material bearing on the question now under consideration, and it must therefore be determined upon general principles of the common law.

It is elementary that, in case a written contract is ambiguous in its terms, parol proof of the facts and circumstances under which it was executed may be introduced to aid in its construction. This rule applies to commercial paper, even in the hands of third persons, because, where the ambiguity is apparent to a reasonably prudent man on the face of the paper, he is necessarily put upon inquiry Mechem, Agency, § 443; Hood v. Hallenbeck, 7 Hun (N. Y.) 362; 10 Cyc. p. 1051; 4 Thompson, Corp. § 5141. The parol evidence in the present case showed without dispute that Mr. Mariner's signature was attached simply in his representative capacity and as agent of the corporation. There being a plain ambiguity in this respect appearing on the face of the note, the evidence was properly received, and the judgment against Mr. Mariner individually was erroneously rendered.

Judgment reversed, and action remanded, with directions to dismiss the complaint.

SECTION 3.—TRANSFER BY INDORSEMENT

I. Blank and Special Indorsements

BROMAGE et al. v. LLOYD et al.

(Court of Exchequer, 1847. 1 Exch. 32.)

Assumpsit. The declaration stated, that the defendants, on, etc., made their promissory note in writing, and thereby jointly and severally promised to pay one H. Lloyd Harries (since deceased), or order, £300. on demand, and then delivered the said note to the said H. Lloyd Harries, who then indorsed the said promissory note, but without making any delivery thereof: and afterwards, to wit, on, etc., the said H. Lloyd Harries died, having first made his last will and testament, in writing, duly executed and attested as by law required, and thereby appointed his then wife, to wit, one Jane Harries, executrix thereof, who, after the death of the said H. Lloyd Harries, to wit, on, etc., duly proved the said will and took upon herself the execution thereof and became and was sole executrix thereof; and she, as such executrix, afterwards, to wit, on, etc., for good and valid consideration to her as such executrix as aforesaid in that behalf, transferred the said note, so indorsed as aforesaid to the plaintiffs to wit, by delivery thereof to them by her as such executrix as aforesaid, of all which the defendants then had notice, and then, in consideration of the premises, promised to pay the amount of the same note to the plaintiffs, according to the tenor and effect thereof, and of the said indorsement and delivery. Breach, nonpayment.

General demurrer, and joinder.[15]

Pollock, C. B. This is an action on a promissory note, upon which a party has written his name, and after his death his executrix delivers the note to the plaintiffs without indorsing it; so that there is a writing of his name by the deceased, and a delivery by his executrix. Those acts will not constitute an indorsement of the note. The person to whom it is so delivered has no right to sue upon it.

Alderson, B. The promissory note was made payable to the testator "or order." That means order in writing. The testator has written his name upon the note, but has given no order; the executrix has given an order, but not in writing. The two acts, being bad, do not constitute one good act.

Rolfe, B. The word "transfer" means indorsement and delivery.

Platt, B., concurred.

Judgment for the defendant.[16]

[15] Arguments of counsel are omitted.

[16] See Louisville Mining Co. v. Trust Co., 18 Colo. App. 345, 71 Pac. 898 (1903).

RIKER v. CORBY.

(Supreme Court of New Jersey, 1811. 3 N. J. Law, 911.)

The action below was brought by Corby, as assignee of Cyrus Baldwin, against Riker, as maker of a note of hand; the note was given by Riker to Baldwin, and indorsed in blank. It was assigned for error, that it did not appear that Corby had any interest in the note.

PER CURIAM. The indorsement in blank was an authority for the indorsee to overwrite an assignment, and this might have been done even at the trial; but as it was not done, it did not appear that Corby had any interest in the note.

Judgment reversed.

CLARK v. WALKER.

(Supreme Court of Indiana, 1841. 6 Blackf. 82.)

DEWEY, J. This was an action of debt by Clark against Walker on three sealed notes for the payment of money. The declaration alleges that the notes were made by Walker, and were payable to one Dobyns, who by indorsement assigned them to Clark. Among several pleas, which led to issues of fact, Walker pleaded non assignment of the notes under oath. On the trial of the cause, the plaintiff produced the notes described in the declaration, on each of which there was a special assignment from Dobyns to the plaintiff. It having been admitted by the parties that the indorsements were originally in blank, and had been filled up after the filing of the plea, and before the replication thereto was put in, the court, on the objection of the defendant, excluded the notes and assignments from being given in evidence.

This decision cannot be sustained. It was competent to the assignee of the notes to fill up the blank indorsements on the trial. Chitt. on Bills, 149. Indeed, it was immaterial whether they were filled up at all or not. We have heretofore decided that a blank indorsement is sufficient, prima facie, to enable the holder of negotiable paper to maintain an action upon it. Bowers v. Trevor, 5 Blackf. 24.

The circumstance that the notes were sealed makes no difference. Such instruments are assignable by indorsement by the statute.

The judgment is reversed with costs. Cause remanded, etc.

BURCH et al. v. DANIEL.

(Supreme Court of Georgia, 1897. 101 Ga. 228, 28 S. E. 622.)

LUMPKIN, P. J. In order to authorize one to institute and maintain in his own name an action upon a promissory note, the legal title to the paper must be in the plaintiff.

This was an action by Daniel upon promissory notes which were originally payable to John A. Fretwell, or order. Upon each of the notes was written the following transfer: "For value received, I hereby sell and transfer the within note to C. S. Pope, without recourse on me. J. A. Fretwell." Without the knowledge or consent of the makers of the notes, the word "order" had been in each of them erased, and the word "bearer" substituted in its stead, before the action was brought, though it does not appear when or by whom these alterations had been made, or that this had occurred before Daniel, the plaintiff, became possessed of the notes.

Whatever may be the truth as to this matter, it is certain that the legal title to the notes was not in the plaintiff when he brought his action. Manifestly it was in Pope, as the notes had never been indorsed by him to any one. The unauthorized change in the phraseology of the notes, whether innocently or fraudulently made, did not render them negotiable by mere delivery. If Daniel was in fact the equitable owner of the notes, he might have instituted an action thereon, for his use, in the name of the person holding the legal title; but, under the facts as they appear in the record before us, his case falls squarely within the rule announced at the beginning of this opinion. In this connection, see Dalton City Co. v. Johnson, 57 Ga. 398; Benson v. Abbott, Parker & Co., 95 Ga. 69, 22 S. E. 127.

Judgment reversed.[17]

SMITH et al. v. CLARKE.

(Nisi Prius, before Lord Kenyon, C. J., 1794. Peake, 295.)

This action was brought by the plaintiffs as indorsees of a bill of exchange against the acceptor.

The bill was indorsed in blank by the payee, and after several indorsements it came to one Jackson (whose assignees had indemnified the present defendant) under a special indorsement to him or order. Jackson sent it to Muir & Atkinson, and they discounted it with the plaintiffs, but Jackson had not indorsed it. The plaintiffs had struck out all the indorsements except the first.

Law, for the defendant, objected that this special indorsement had restrained the negotiability of the bill, and that the plaintiffs could not recover without an indorsement by Jackson.

[17] See same case 109 Ga. 256, 34 S. E. 310 (1899).

LORD KENYON. The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present plaintiffs.

Note.—The plaintiffs afterwards proved a letter from Jackson to Muir & Atkinson, desiring them to discount this and other bills, but Lord Kenyon thought the plaintiffs' case sufficiently made out without this evidence.

MYERS & SON v. FRIEND & SCOTT.

(Supreme Court of Appeals of Virginia, 1821. 1 Rand. 12.)

This was an appeal from the superior court of Prince George county. In that court, Myers & Son brought an action of detinue against Friend & Scott for a certain treasury note numbered 2,562, dated the 11th day of October, 1814, and made payable the 11th day of October, 1815, being for the sum of $1,000, which note was made payable to James Barbour or order at Washington and by him indorsed on the back as follows: "Pay to George Rowland or his order. James Barbour." Under this indorsement, there was a blank indorsement by the said Rowland, thus: "George Rowland." Myers & Son, being regularly possessed of the said note under the last mentioned indorsement, made the following indorsement under the name of the said Rowland: "Pay to the cashier of the branch of the State Bank of North Carolina at Newbern, or order. Moses Myers & Son." The said note, thus indorsed, was inclosed in a letter by mail to the said cashier at Newburn; but the mail in which it was conveyed was robbed, the letter and note taken out, and the note, by means unknown, came to the possession of one Jackson, who transferred the same to Chappell, who transferred it to Parish, who transferred it to James H. Hardaway, a merchant of Brunswick, who received the same in the ordinary course of business and for a valuable consideration without any notice of the loss by the plaintiffs, unless an advertisement, inserted in the Petersburg Republican (a newspaper of Petersburg, in which town the defendants reside) and other papers, should be deemed a notice. The note afterwards came regularly to the hands of the defendants. After the institution of this suit, the defendants erased all the indorsements subsequent to the blank indorsement aforesaid by George Rowland, so that only the indorsements of Barbour and Rowland remained on the said note at the trial; but the indorsement of the plaintiffs to the cashier aforesaid, though erased, was still legible.

The jury who tried the cause found a special verdict, setting forth the facts above stated, and submitting the law arising from them to the decision of the court.

The court pronounced judgment in favor of the defendants, and the plaintiffs appealed to this court.

ROANE, J. The court is of opinion that as the treasury note in question is, by the act of Congress providing for its emission, transferable by delivery and assignment only, it could not have been transferred originally without such an assignment. A property in it could not have been acquired, as against the true owner, by a mere possession thereof, even for a valuable consideration actually paid. This privilege only attaches as against the true owner, in relation to bank notes, or cash notes payable to bearer, or notes indorsed in blank, and which thereby become, in effect, payable to the bearer; and it only attaches in consideration of the cash quality which these papers have, and from their circulating in currency by mere delivery only, and being generally, if not universally, considered as money. This ground of claim was sanctioned in favor of the bona fide holder of such papers, in the case of Wilson v. Rucker, 1 Call, 500. But it was also held that it did not extend to include military certificates, which were only considered as mere documents of debt, and not as cash or currency. It did not include them, although it was found by the verdict in that case that there was a general custom that they could be transferred by delivery only, without assignment. No such custom is found in relation to the note in question; and, therefore, that case is more than an authority for ousting this note from the privilege now claimed. In this respect, this case is much weaker than that of Wilson and Rucker; and, considered in relation to its original state, the claim of the appellee would be clearly repelled.

The court is also of opinion that this character of the paper was not changed by the indorsement of Barbour to Rowland, or his order; and if a greater negotiability should be held to have been given to it by the blank indorsement of the latter, that negotiability might be again restrained by a special indorsement, and the note thereby brought back to its original state. The indorsement to the cashier of the Bank at Newbern "or his order" is not different from that of Barbour to Rowland "or his order," which preceded the blank indorsement of the latter, and, as is before said, transferred no property by a mere delivery. The case of Ancker v. Bank of England, Doug. 637, shows that such a restriction may be made; that the negotiability of a bill or note may be stopped or lessened; and that, in case of a special or restricted indorsement, the receiver is bound to read it at his peril, and see that he comes within the authority comprised in it. In the case before us, the appellee should have deduced his title to the note under that cashier to whom it was confided and indorsed. He could acquire no property in it from another, from a man who only had the possession of it. He therefore had no right to strike out the last indorsement, but that right appertained to the present appellants; and by striking out the name of the cashier at Newbern, to whose

hands it had never come, and who was to be the mere agent of the appellants, they entitled themselves to bring this action.

We are therefore of opinion that the law on this special verdict is for the appellants, and that the judgment of the superior court is erroneous and should be reversed, and entered for the appellants.

DOLLFUS et al. v. FROSCH.

(Supreme Court of New York, 1845. 1 Denio, 367.)

Assumpsit, tried at the circuit court for the city and county of New York in October, 1843, before Kent, late Chief Judge. The suit was commenced by declaration containing the money counts in September, 1842. The plaintiffs offered in evidence four several bills of exchange, all dated New York, December 23, 1841, drawn (per procuration) by the defendant, by E. Brue, addressed to Messrs. Johnston & Co. at Paris, France, and payable to the order of Messrs. Dollfus, Meig & Co. (the plaintiffs), on the 10th day of July then next, for different sums, amounting in the whole to 18,427 francs. Three of the bills appeared to have been indorsed to Messrs. Raymond & Co., and the fourth to Mr. B. Renville; and the last appeared to have been several times afterwards transferred by full indorsements, the last indorsee being "the bank of France." On the face of each of the bills the words "nonacceptable" were written between the lines. When the bills were produced at the trial a pen had been drawn over the indorsements, apparently with a view to cancel the same, by which they were rendered nearly illegible.

The defendant's counsel objected to the reading of the bills in evidence on the ground that the indorsements showed the title of the bills to be in the indorsees, and that a retransfer was necessary to enable the plaintiffs to maintain a suit upon them. The objection was overruled, and the defendant's counsel excepted.[18] Verdict for plaintiff.

JEWETT, J. * * * The second point made by the counsel for the defendant was that inasmuch as it appeared from the drafts that they contained special indorsements, without any retransfer to the plaintiffs, they were bound to explain the indorsements, and show that they were made to agents for the purpose of collection.

The case shows that when the drafts were produced on the trial these indorsements had been struck out by the drawing of a pen across them. I am of opinion that the objection is not well taken, and that, the indorsements having been struck out, the law did not require the plaintiffs to show that such indorsements were made for the purpose of collection before they were entitled to stand in court prima facie as the owners of the drafts. In Manhattan Company v.

[18] The statement of facts is abridged, and only that portion of the opinion relating to this exception is printed.

Reynolds et al., 2 Hill, 140, the indorsement to "Kendrick or order" had not been struck out. Prima facie, therefore, Kendrick might be deemed the owner until it was proved that the object of the indorsement was to enable him to collect the paper on account of the plaintiffs. Chautauqua County Bank v. Davis et al., 21 Wend. 584, was a suit upon a bill of exchange drawn by Henry Davis and three other persons, on William Davis of New York, payable to the order of A. D. Patchin. The action was joint against the drawer and acceptor. The bill had been indorsed, "Pay Richard Yates, Esq., Cashier, or order. A. D. Patchin, Cashier," and "Pay H. Baldwin, Cashier, or order. R. Yates, Cashier, per F. Leak." All the indorsements, except the signature "A. D. Patchin," were stricken out. The defendant moved for a nonsuit, on the ground that title to the bill was not shown in the plaintiffs. The plaintiffs then proved that the bill belonged to them, that Patchin was their cashier, and that the indorsements to Yates and Baldwin were made solely for collection.

The point raised in the case now under consideration did not arise in either of the cases referred to. In those cases the point was whether the plaintiffs having proved that the indorsements had been made for the purpose of collection, and that the plaintiffs in fact owned the notes, authorized them on the trial to strike out such indorsements. In this case the indorsements had been made by the plaintiffs, upon each of the drafts, and one had been subsequently indorsed by the indorsees. On the trial, when the drafts were produced in evidence, such indorsements had all been stricken out, when or by whom there was no evidence; nor was there, in fact, any evidence as to the purpose for which the indorsements had been made, or by what means the plaintiffs had become possessed of the drafts. It appears, by a note under the first case above cited, that in Hart et al. v. Windle, 15 La. 265, it was decided that a special indorsement by the plaintiff appearing on the note, at the trial, prima facie the right of action was in the indorser; and unless the former showed title by retransfer, or that the indorser had no interest beyond a mere agency, the action would fail, and that possession of the note by the plaintiff would not be sufficient to overcome the presumption arising from the indorsement.

That it was not necessary for the plaintiffs, in order to be entitled to recover, to make such proof in this respect, as contended for by the defendant's counsel, I think is settled by the case of Dugan et al., Executors of Clark, v. United States, 3 Wheat. 172, 4 L. Ed. 362. That was a suit upon a bill payable to the order of J. Clark, which by several intermediate indorsements came to T. T. Tucker, Treasurer of the United States, or order, who purchased it for the government with government funds. He afterwards indorsed it to Willinks & Van Staphorst specially, by whom the bill was presented for acceptance and acceptance refused. When produced, the last indorsement was still on the bill, and the objection was taken that the plaintiff could not recover without showing a reindorsement; but the court

held that the evidence was sufficient to entitle the plaintiff to recover upon the bill. Mr. Justice Livingston, in delivering the opinion of the court, says: "After an examination of the cases on this subject (which cannot all of them be reconciled) the court is of opinion that if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill or not, as he may think proper." * * *

New trial denied.[19]

RIDER v. TAINTOR.

(Supreme Judicial Court of Massachusetts, Berkshire, 1862. 4 Allen, 356.)

Contract upon the following promissory note: "$107. Six months from date, for value received, I promise to pay Stephen E. Avery or bearer one hundred and seven dollars with use. Lee, December 1, 1860. Albert J. Taintor." The note bore the following indorsement: "Pay E. A. Bliss, cashier, or order. Warren Newton, Cashier."

At the trial in the superior court, it appeared that the plaintiff had purchased the note in suit before it became due for a full consideration, but the bill of exceptions stated that "there was no evidence that E. A. Bliss, to whom said note had been indorsed, had transferred or indorsed said note to the plaintiff," or "that the plaintiff had any title in said note from said Bliss, or that said note was sued with the knowledge or assent of said Bliss." Rockwell, J., ruled that the plaintiff was entitled to recover, and the jury returned a verdict accordingly; and the defendant alleged exceptions.

BIGELOW, C. J. The contract of the promisor of the note declared on is to pay the sum due on the note at its maturity to the person who shall then be the bearer. The production of the note by the plaintiff is therefore evidence of his title, and, accompanied as it was in the present case with proof that the plaintiff had become the owner of the note by purchase before it became due, established a conclusive right to recover against the defendant.

The indorsement of a third person, directing the payment of the note to be made to the order of another, did not change the contract

[19] Accord: Middleton v. Griffith, 57 N. J. Law, 442, 31 Atl. 405, 51 Am. St. Rep. 617 (1894); Bank of Kansas City v. Mills, 24 Kan. 604 (1880); Curtis v. Sprague, 51 Cal. 239 (1876). Contra: Southern Bank v. Bank, 27 Ga. 252 (1859). Compare New Haven Co. v. New Haven Co., 76 Conn. 126, 55 Atl. 604 (1903); Jerman v. Edwards, 29 App. D. C. 535 (1907).

of the promisor, or enable him to set up in defense that the plaintiff's title was imperfect, merely because he had not obtained the signature of the person to whom some intermediate holder had ordered the note to be paid. Wilbour v. Turner, 5 Pick. 526; Wayman v. Bend, 1 Camp. 175; Story on Notes, § 132.

Exceptions overruled.

II. Restrictive Indorsement

EDIE & LAIRD v. EAST INDIA CO.

(Court of King's Bench, 1761. 1 Wm. Bl. 295.)

Action on two bills of exchange of £2,000. each, drawn by R. Clive on the East India Company, at 365 days after date, payable to R. Campbell or order. Campbell indorsed one to Ogleby, "or order," the other to Ogleby, without adding the words "or order." But at the trial the words "or order" appeared upon the indorsement in another handwriting. The East India Company accepted both bills. Ogleby then indorsed them to the plaintiffs, and soon after became insolvent. The company then refused payment. The jury found a verdict for the plaintiffs on the first bill, but for the defendants on the second, apprehending that by the usage of merchants it was not assignable, without the words "or order" in Campbell the payee's indorsement.

Morton moved for a new trial.[20]

Lord Mansfield, C. J. There can be no dispute. Where the indorsement is in blank, there you may write over it whatever you please. And it has been permitted to be done even in court. Lucas v. Marsh, Barnes, 453; Lambert v. Oakes, 1 Ld. Raym. 443, Salk. 127. But for this there is no occasion. Everything shall be intended upon such a blank indorsement. The point relied on at the trial for defendants was that, where a special indorsement was made to A. B., and the indorser omitted the words "or order," this was equivalent to the most restrictive indorsement. Many witnesses were examined by defendants to prove this usage. But it did not appear that in any one fact the indorsee of such special indorsement ever lost the money by such omission. The evidence was only matter of opinion. I told the jury that upon the general law (laying usage out of the case) the indorsement carried the property to Ogleby; and that the negotiability was a consequence of the transfer. But if they found an established usage among merchants that, where the words "or order" were omitted, the bill was only negotiable on the credit of the indorsee, they should find for the defendants. If otherwise, or they were doubtful, then either for the plaintiffs, or make a case of it. They found for

[20] Arguments of counsel and the opinions of Foster and Wilmot, JJ., are omitted.

the defendants on the bill in question; for the plaintiff on the other, concerning which there was no dispute.

Now, upon the best consideration I have been able to give this matter, I am very clear of opinion that, at the trial, I ought not to have admitted the evidence of usage. But the point of law is here settled; and, when once solemnly settled, no particular usage shall be admitted to weigh against it. This would send everything to sea again. It is settled by two judgments in Westminster Hall, both of them agreeable to law and to convenience. The two cases I go upon are Moore and Manning, in Comyns, and Acheson and Fountain, in Strange. These cases go upon a general proposition, in law, that an indorsement to A. implies "or order," and is negotiable. The main foundation is to consider what the bill was in its origin. The present bill, in its original creation, was not a bare authority, but a negotiable draft. There are no restrictive words in it. And whatever carries the property carries the power to assign it. It were absurd, if the merchant's opinion should prevail, that this is now converted into a personal authority. If it be such, and the indorsee dies, it could not go to his executors and administrators, in whom most clearly the property of the bill does vest. Upon this ground, that the point is settled both by King's Bench and Common Pleas, and well settled, I think there should be a new trial. Otherwise, also, I should be of the same opinion. Certainly, the suggestion of surprise is not in all cases a reason for a new trial; but in particular cases, such as the present, it may be.

The question of costs is very peculiar. There is a verdict in part for the plaintiff, which already carries costs for him. But, for form's sake, we must set aside the whole verdict, which is usually done on payment of costs. But this will be giving defendants costs, which they could not otherwise have, merely because they have obtained an improper verdict. Therefore, I think that, under these particular circumstances, the verdict should be set aside without costs.

DENNISON, J. I am of the same opinion. If the words to A. B. only were inserted, I should think it would not be restrictive; at least it should be left to a jury. In Rawlinson and Stone, M. 20 Geo. II, Barnes, 164, Willes, 559, in C. P., confirmed on error in K. B. 3 Wils. 1, 2 Stra. 1260, an inland bill of exchange was drawn payable to A. or order, who indorsed it to B., without adding anything more. The question was, Whether there was such an interest in the executor of the assignee, as that he might assign it. The court held, upon inquiry from merchants, that it might be indorsed thus: "C., Executor or Administrator of B." When a man says, "Pay to A.," the law says, it is "to A. or order." He then says, "I intend it should not be so." What signifies what you intend? The law intends otherwise. Same opinion as to costs.

New trial was granted without payment of costs.[21]

[21] See Power v. Finnie, 4 Call (Va.) 411 (1797).

BLAINE, GOULD & SHORT v. BOURNE & CO.

(Supreme Court of Rhode Island, 1875. 11 R. I. 119, 23 Am. Rep. 429.)

Assumpsit on a bill of exchange, heard by the court.

POTTER, J. The draft in question was as follows:

"Banking House of Blaine, Gould & Short,

"North East, Pa., August 16, 1873.

"Thirty days after date pay to the order of Frank Thayer seven hundred dollars. Frank Thayer.

"To Messrs. B. G. Chace & Co., Providence, R. I.

"Due September 18."

Thayer was the agent in Pennsylvania to make purchases for Chace & Co., of Providence, and he drew on them for payment.

This draft was indorsed by Thayer in blank, and was discounted by the plaintiffs before acceptance. The plaintiffs indorsed it as follows:

"Pay Jay Cooke & Co., or order, on account of Blaine, Gould & Short, North East, Pa. Alfred A. Short, Cash'r."

By Jay Cooke & Co. it was sent to the defendants in Providence for collection, indorsed as follows:

"Pay to the order of Messrs. Bourne & Co.

"Jay Cooke & Co."

The draft was paid by Chace & Co. to the defendants about noon of September 18. Jay Cooke & Co. stopped payment about 11 a. m. of that day, and about 1 p. m. of the same day their failure was generally known in Providence.

The draft was never the property of Jay Cooke & Co., and was never credited by them to the plaintiff, but was merely received by them for collection.

Jay Cooke & Co. were owing the defendants, and the defendants credited it in their account with them, and claim that they had a right so to do.

The rights of parties to bills forwarded for collection have been a fruitful source of litigation. Questions of this sort have generally arisen where some party becomes insolvent, and the contention is who shall bear the loss.

When is the last holder of paper sent for collection bound to look beyond the last remitter?

We are referred by defendants' counsel to one case only. Bank of Metropolis v. New England Bank, 17 Pet. 174, also in 1 How. 234, 11 L. Ed. 115. In that case a bank had forwarded for collection paper with a general or unrestricted indorsement to another bank, which, with its own similar indorsement, had sent it to a third bank for collection. The second or intermediate bank failed, and on the day of its failure notified the third bank that the paper was the prop-

erty of the first bank. In a suit by the first against the third bank to recover the proceeds, the court, while admitting that if it was a case of two banks acting as collecting agents for each other, and where no consideration was paid or money advanced, the paper would remain the property of the sender, holds that in this case the third bank, which held the paper, not having notice by the indorsement or otherwise that the paper was not the property of the second bank, had a right to treat it as theirs, and was not bound to inquire, and that where two banks dealt together in this way for several years, kept an account current, and mutually credited the collections, there was a lien upon the paper so transmitted for the balance without regard to who might be the real owner. The first bank, by indorsing the paper in such a manner as to make it appear prima facie the property of the failing bank, had no particular equity in its favor.

But this came again before the United States Supreme Court in Bank of Metropolis v. New England Bank, 6 How. 212, 12 L. Ed. 409, where the court lays down its propositions more definitely: That if the collecting bank, at the time of the dealings, had notice that the bill was not the property of the intermediate remitting bank, but had been merely sent by them for collection as agent for some other bank, then the collecting bank had no right to retain for any balance due from the intermediate bank which had failed. Even if the collecting bank had no notice, they could not retain as against the real owner, unless credit had been given to the intermediate remitting bank, or what was equivalent, balances suffered to remain to be met by such paper; but if the latter was the case, and they had treated the intermediate bank as the owner, and had no notice, then they might retain.

And there are further explanations of the decision in Wilson v. Smith, 3 How. 763, 769, 11 L. Ed. 820. And see it criticised and restricted in McBride v. Farmers' Bank of Salem, 25 Barb. 657, 661, which case was affirmed on appeal in McBride v. Farmers' Bank, 26 N. Y. 450. See, also, Reeves et al. v State Bank, 8 Ohio St. 465; Jones v. Milliken & Son, 41 Pa. 252; Dickerson v. Wason, 54 Barb. 230, also in 47 N. Y. 439, 7 Am. Rep. 455. There are some cases going still further in favor of the original remitting bank, and allowing parol evidence to show the fact. Lawrence v. Stonington Bank, 6 Conn. 521, and cases there cited; Bank of Washington v. Triplett & Neale, 1 Pet. 25, 7 L. Ed. 37; Commercial Bank of Clyde v. Marine Bank, *42 N. Y. 337, also in 1 Abb. Dec. 405.

A general indorsement of bills is prima facie evidence of property in the indorsee, and, even where it is subject to any equity or trust between former parties, may change the legal property as to bona fide holders for value. Collins v. Martin, 1 B. & P. 648. But even where there is a general indorsement of paper sent only for collection, it will still remain the property of the sender as to all persons having notice.

The counsel for the plaintiffs say that the present case would come under the head of what is in some places denominated a "short entry." It would seem that in London it was a custom (Giles et al. v. Perkins et al., 9 East, 12, and counsel arguendo in Ex parte Thompson, 1 Mont. & Mac. 102, 110) for bankers to receive bills for collection and to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected; and this was called a "short entry," or "entering short." And such bills always continued the property of the customer, unless the contrary was to be inferred from some course of dealing. Whereas country bankers in England generally credited to their customers at once all bills considered good, and generally allowed drafts upon the proceeds. And even in the latter cases Lord Ellenborough held such bills did not pass to the assignees in bankruptcy, if there was a balance in favor of the customer over and above the bills. Giles et al. v. Perkins et al., 9 East, 12; Ex parte Harford, 2 Rose, 163. But Lord Eldon held that where they were with the knowledge of the customer entered as cash, and the customer was entitled to draw against them, he could not claim the specific bills. Ex parte Sargeant, 1 Rose, 153; Ex parte Thompson, 1 Mont. & Mac. 102 (A. D. 1828). But even where the custom was to enter short, and it was not done, this would not change the property, unless some act of the customer concurred. Ex parte Sargeant, 1 Rose, 153; Ex parte Pease, 1 Rose, 232; and the Vice Chancellor's opinion in Ex parte Thompson, 1 Mont. & Mac. 102, 112.

But besides the ground that this was equivalent to a short entry, and that the cases decided upon that point apply to it, it is contended that in this case the effect of the restriction in the indorsement was to give to all subsequent holders express notice of the trust, and we think this view of the plaintiff's counsel is correct.

The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent. Ex parte Sargeant, 1 Rose, 153. The very mode of indorsement in this case shows that it is not a case of ordinary indorsement, and that no consideration has been paid for it. Eadie & Laird v. E. India Co., 1 W. Bla. 295, also in 2 Burr. 1216. The bill must be taken by the holder subject to the trust; and, says Judge Story (on Agency, § 211), if he voluntarily consents to or aids in any other appropriation he is responsible; and says Judge Byles (on Bills, *157), he holds the bill or money as trustee for the restraining party, and is liable to the party making the restriction. The words are notice that the restricted indorsee has no property in the bill, that he is a mere trustee, and that he can appoint no subagent except for the purpose of holding the bill or money on the same trust, and if the holder pays it to the intermediate agent he becomes responsible for its misapplication.

In the case of Sigourney v. Lloyd et al., 8 B. & C. 622, also in 3

M. & R. 58, and in Dan. & Ll. 132, 2 Chitty, Jr., on Bills, 1412, 1439, it was contended that an indorsement, "Pay to B. for my use," was a mere direction to B. as to the application of the money; but Lord Tenterden said that if it meant no more the words were useless, as he would be so liable without those words.

In that case the payee indorsed generally to A. A., the plaintiff, indorsed, "Pay B. or order for my use." The defendants discounted it and applied it to the credit of B. B. failed, and it was held that the indorsement was sufficient notice to prevent its transfer for the benefit of any other person; that all subsequent indorsees were trustees for the plaintiff; and that whoever advanced any money on it did it at his peril. And on appeal this judgment was confirmed by the Exchequer Chamber, the court holding that the money to whomsoever paid was in trust for the indorser. Lloyd et al. v. Sigourney, 5 Bing. 525, also in 3 M. & P. 229, and 3 You. & Jer. 220, and Dan. & Ll. 213.

This custom of restricted indorsing is not of late origin, but is spoken of as usual in Snee et al. v. Prescott et al., 1 Atk. 245, 249 (A. D. 1743); the object being, as there stated, to prevent the indorsement being filled up in such a manner as to pass the interest in the bill.

If the defendants in the present suit had paid the cash to Jay Cooke before hearing of the failure, it would have presented a different question. But they had no right to apply the money of the plaintiffs to the payment of a debt due to them (the defendants) from Jay Cooke. This is not such a payment as can protect them against a suit by the plaintiffs, the real owners. Truettel v. Barandon, 2 Chitty, Jr., on Bills, 1002, also in 8 Taunt. 100, and 1 Moore, 543; Thompson v. Giles, 2 Chitty, Jr., on Bills, 1190, also in 2 B. & C. 422, and 3 D. & R. 733; Lloyd's note to Paley, quoted in full in Story on Agency, § 228, note; 1 Bell's Comm. *270, which work is praised by Mr. Warren as being a "mine of commercial law."

Judgment for plaintiffs.

HOOK v. PRATT et al.

(Court of Appeals of New York, 1879. 78 N. Y. 371, 34 Am. Rep. 539.)

Appeal from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury (reported below, 14 Hun, 396).

This action was brought by plaintiff, as trustee of Charles H. Hook, against defendants, as executors of the will of James P. Haskin, deceased, upon a draft signed and indorsed by said testator, of which the following is a copy:

"$5,000. Syracuse, N. Y., September 13, 1872.

"Orrin Welch, Treasurer Morris Run Coal Co.. Pay to the order of myself, one year after date, five thousand dollars, for value received. [Signed] J. P. Haskin

Indorsed: "Pay to the order of Mrs. Mary Hook, 35 King, for the benefit of her son Charlie. [Signed] J. P. Haskin."

Defendants waived demand upon the drawee and notice of protest. Upon the trial defendants' counsel moved for a nonsuit, in substance, upon the ground that the indorsement was restrictive and did not import a consideration, but imported a gift. The motion was denied and said counsel excepted.

It was then admitted by plaintiff's counsel that Charles H. Hook, the cestui que trust, and the "Charlie" referred to in the indorsement, was a boy some seven or eight years old at the date of the draft; that he was claimed by plaintiff to be the illegitimate son of defendants' testator, which claim was admitted by said Haskin; that plaintiff was at the date of said draft a married woman, living in the city of Rochester with her husband, who is made a party defendant, and was married not long before the draft was drawn. The boy lived with her and was taken care of by her. A motion was again made for a nonsuit, which was denied, and defendants' counsel excepted.[22]

RAPALLO, J. The point mainly relied upon by the appellant is that the draft and indorsement upon which this action is brought do not on their face import a consideration. The draft was drawn by the defendants' testator upon the treasurer of an incorporated company, payable to the drawer's own order, and purported to be for value received. It was indorsed by the drawer by a special indorsement, "Pay to the order of Mrs. Mary Hook, for the benefit of her son Charlie." The appellant claims that this is one of those restrictive indorsements which do not purport to be made for a consideration, and do not entitle the indorsee to maintain an action on the bill, without proving a consideration.

As a general rule an indorsement of a negotiable bill which purports to pass the title to the bill to the indorsee imports a consideration, and the burden of proving want of consideration rests upon the party alleging it. The restrictive indorsements which are held to negative the presumption of a consideration are such as indicate that they are not intended to pass the title, but merely to enable the indorsee to collect for the benefit of the indorser, such as indorsements "for collection," or others showing that the indorser is entitled to the proceeds. These create merely an agency, and negative the presumption of the transfer of the bill to the indorsee for a valuable consideration.

But where the indorsement purports to pass the title to the bill

[22] Arguments of counsel and citations of authorities at end of opinion are omitted.

therein from the indorser, and divest him of all beneficial interest, a consideration for such transfer is presumed. All the cases cited by the counsel for the appellant rest upon these principles. The citation from 3 Kent, Com. 92, states the principle to be that when the indorsement is a mere authority to receive the money for the use or according to the directions of the indorser, it is evidence that the indorsee did not give a valuable consideration for it and is not the absolute owner. This accords with the statement of the principle by Wilmot, J., in Edie v. E. India Co., 2 Burr. 1227. So an indorsement, "Pay to S. W. or order for our use" (Sigourney v. Lloyd, 8 B. & C. 622, 3 Y. & J. 220), was held to create a mere agency, and the addition even of the words "value received" to such an indorsement has been held not to vary its effect (Wilson v. Holmes, 5 Mass. 543, 4 Am. Dec. 75). In Edie v. East India Co., 2 Burr. 1221, the examples of restrictive indorsements put by way of illustration are, "Pay to my steward and no other person," or "Pay to my servant for my use." These show that there was no intention to pass the title to the bill; and the same effect has been given to an indorsement, "Pay to P. only." It was held that these words indicated that the indorsee was agent only, and paid no consideration for the bill, as a purchaser would not have accepted such an indorsement. Power v. Finnie, 4 Call (Va.) 411. But an indorsement to one person for the use or benefit of another affords no such indication. The indorser parts with his whole title to the bill, and the presumption is that he does so for a consideration. The only effect of such an indorsement, by way of restriction, is to give notice of the rights of the beneficiary named in the indorsement, and protect him against a misappropriation. When a bill is indorsed, "Pay to A. or order for the use of B.," A. cannot pass the bill off for his own debt, but he can by indorsing it transfer the title, and will hold the proceeds for the benefit of B., and be accountable to him for them. Evans v. Cramlington, Carth. 5, affirmed in the Exchequer Chamber, 2 Vent. 309. In Treuttel v. Barandon, 8 Taunt. 100, cited by the appellant, drafts payable to the drawer's own order were indorsed by him to De Roure & Co. or order "for the account of Treuttel & Wurz." It appeared that De Roure & Co. were the agents of Treuttel & Wurz, and the latter were held entitled to maintain trover for the drafts against a party to whom De Roure & Co. had pledged them for their own debt. There is nothing in this case to sustain the proposition that a draft thus drawn and indorsed does not import a consideration, or that the indorsee could not maintain an action upon it against the drawer and indorser without proving a consideration. The effect of the special indorsement was simply to give notice of the interest of Treuttel & Wurz, and prevent De Roure & Co. from appropriating the drafts to their own use. Blaine v. Bourne, 11 R. I. 119, 23 Am. Dec. 429, is to the same point.

In the present case the indorsement did not purport to restrain the indorsee from negotiating the draft, for it was "Pay to the order

of Mrs. Mary Hook," for the benefit of her son Charlie. She was constituted trustee of her son and held the legal title. 3 Kent, Com. 89. The indorsement gave notice of the trust, so that if she had passed it off for her own debt, or in any other manner indicating that the transfer was in violation of the trust, her transferee would take it subject to the trust, but there was nothing reserved to the drawer and indorser. He retained no interest in it. The presumption is that the draft was drawn and indorsed by him for a consideration received either from the indorsee or the beneficiary. If the youth of the beneficiary should be deemed to afford a presumption that no consideration was paid by him, the presumption would be that it emanated from his mother.

The facts admitted on the trial do not establish that the consideration was illegal. They show that the boy lived with his mother and was taken care of by her. There is nothing illegal in an undertaking by a putative father to support his illegitimate child, or to pay a sum of money in consideration of such support being furnished by another, though it be the mother of the child. If such was the consideration of this obligation, and it was furnished by Mrs. Hook, she was at liberty to take it, payable to herself in her own right, or for the benefit of her child. * * *

Judgment affirmed.

WILLIAMS, DEACON & CO. v. SHADBOLT.

(Queen's Bench Division, 1885. 1 Cab. & El. 529.)

This was an action on bills of exchange by indorsees against the acceptors.

The Dana Land & Lumber Company carried on business in Mobile, Alabama, United States, and consigned timber from time to time to the defendants, timber merchants and agents in London. The course of business was for the Dana Company to draw on the defendants from time to time, not against particular shipments, but for amounts regulated by the quantity of timber in course of shipment. These drafts the Dana Company used to discount with the Bank of Mobile, at Mobile; and the Bank of Mobile forwarded them to the plaintiffs in London indorsed restrictively in the manner the bill hereinafter set out was indorsed. The plaintiffs on receiving the draft would take it to the defendants for acceptance, and the plaintiffs thereupon credited the Mobile Bank with the amount of the draft, and allowed them to draw on them at once against the amount so credited. The acceptances would then, in the ordinary course, be paid by the defendants to the plaintiffs at maturity. The defendants were not aware that the plaintiffs used to allow the Bank of Mobile to draw against the amount of the acceptances before maturity.

In pursuance of the above course of business the Dana Company drew bills upon the defendants in a form of which the following is a sample:

"Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of ourselves £1,600. sterling value received, and charge the same to account of as advised.

"Dana Land and Lumber Company.

"To Messrs. Geo. Shadbolt & Son, London."

This draft with others was discounted by the Dana Company with the Bank of Mobile, and indorsed to the bank. The bank indorsed the drafts to the plaintiffs as follows:

"Pay to the order of Messrs. Williams, Deacon & Co., for collection per account of the Bank of Mobile, Mobile, Alabama.

"A. F. Manley, Cashier."

The plaintiffs presented the drafts to the defendants for acceptance, and the defendants accepted the same. The plaintiffs thereupon allowed the Bank of Mobile to draw on them for the amount of the said bills.

Before the bills matured, the Dana Company paid to the Bank of Mobile the amount of the bills, and wrote to the defendants releasing them from their liability as acceptors.

The defendants never received any assignments of timber on account of these bills.

Subsequently both the Dana Company and the Bank of Mobile failed.

Cave, J. The question is what is the effect of a bill being restrictively indorsed? Section 35 of the Bills of Exchange Act, 1882, defines a restrictive indorsement as one which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof. We have therefore in this case an indorsement which is not a transfer of the ownership of the bill, but merely operates as an authority to the indorsee to receive the money on behalf of the indorser. This kind of indorsement was well known long before the act of 1882. In Lloyd v. Sigourney, 5 Bingham, 525, the bankers of the person to whom the bill was restrictively indorsed discounted the bill for their customer, and allowed him to apply the proceeds for his own use; and it was held that the bankers were liable for that amount to the indorser. Best, C. J., there says: "Whoever reads the indorsement on this bill of exchange must perceive that its operation is limited, and that the object of the indorser was to prevent the money received in respect of the bill from being applied to the use of any other person than himself. To whomsoever the money might be paid, it would be paid in trust for the indorser; and into whose hands soever the bill traveled, it carried that trust on the face of it. And we see no inconvenience to commercial interests from such a limita-

tion of the effect of the indorsement so expressed. The only result will be to make parties open their eyes, and read before they discount." Those observations are eminently applicable in this case. The indorsee had authority to collect the amount of the bill; but the ownership of the bill and of the debt remained in the Bank of Mobile, and the payment to that bank was a perfectly good payment. That it is a good payment is perfectly clear, unless the course of business between the plaintiffs and the Bank of Mobile makes a difference; for the appointment of an agent to receive a debt does not prevent the payment of the debt to the real creditor. Can, then, the arrangement between the plaintiffs and the Bank of Mobile, that the latter shall draw on the former for the amount of the acceptances, affect the rights of the parties to the bill, and alter the quality of the indorsement? Can it be that, if the Bank of Mobile does not draw against an acceptance, the defendants can pay the amount of the acceptance to the Bank of Mobile; but if the Bank of Mobile does draw, then the defendants can only legally pay the plaintiffs, and this, though the defendants know nothing about the arrangement between the plaintiffs and the Bank of Mobile? Again, if the property in the bill passes to the plaintiffs, when does it pass? Clearly not at the time of the indorsement. Does it pass, then, at the time the advance is made by the plaintiffs? This would be subsequent to the indorsement and delivery of the bill; and so the property in the bill would pass without indorsement or delivery. In my opinion the plaintiffs never got any property in the bill. They got merely an expectation that the money would be paid by the defendants, but were never owners of the bill. The plaintiffs' right of action is against the Bank of Mobile, and not against the defendants. As against the defendants, they cannot assert rights in respect of the bill which their indorsers, the Bank of Mobile, cannot assert; and it is clear that the Bank of Mobile have no cause of action against the defendants.

I do not think this decision can produce any mischief or inconvenience. As Chief Justice Best says: "Parties must open their eyes and read before they discount."

If the plaintiffs desire to secure themselves in the course of business they have adopted, they should insist upon a general indorsement, and not take a restrictive one. A restrictive indorsement has been long used for the very purpose of preventing the property in the bill from passing, and its effect as so doing has now been sanctioned by the Legislature; and it would be very dangerous to hold that, by reason of a secret arrangement between indorser and indorsee, a title can be conferred, and the property pass, and so the rights of the acceptor be affected, without his knowledge.

Judgment for the defendants.[23]

[23] Accord: Smith v. Bayer, 46 Or. 143, 79 Pac. 497, 114 Am. St. Rep. 858 (1905).

III. Qualified Indorsement.

EPLER v. FUNK.

(Supreme Court of Pennsylvania, 1848. 8 Pa. 468.)

Rogers, J.[24] This is an action by an indorser against the maker to recover $100, payable to the order of Henry Hamer 12 months after date. It is indorsed to J. M. Funk, without recourse. The defense is, that the consideration of the note was for the right of vending Hoover's patent cornstalk cutting machine, in Dauphin county; that the machine was entirely worthless, and that defendant was induced to enter into the contract by combination, contrivance, and fraud. The plaintiff, after proving the handwriting of the maker and indorser, offered the note in evidence, which was objected to, because, the defendant says, it is not admissible under the statement filed, and in a case like this it is necessary to file a narr., setting out specially the cause of action, the transfer of it, and all the special circumstances. But we are of opinion there is nothing in the objections. The case was clearly embraced by the statement, and the cause of action is set out with convenient certainty. There is nothing in the second bill. An indorser, it is true, is not a competent witness for the indorsee; but where he is released by the indorsee, as here, he is competent, not to impeach, but to enforce payment of, the note. This has been repeatedly ruled. Vide Barnes v. Ball et al., 1 Mass. 73; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

The third bill presents more difficulty. The defendant contends that, under the circumstances exhibited on the face of the note, on the special indorsement and the facts given in evidence, he is entitled to make the same defense against the indorser as between the original parties to the note. The note is indorsed by the payee to the order of J. M. Funk, the plaintiff, "without recourse." This, it is said, is not in the usual course of business; that it was sufficient to put the indorser on his guard, and to lead him to suspect there was something wrong in the transaction, as between the maker and payee. But although most usually notes go forth indorsed in blank, yet I cannot agree that such an indorsement affects the negotiable quality of the paper. It shows only an unwillingness to be answerable for the solvency of the maker—a prudent precaution, particularly where, as here, the note has a long time to run before it matures. And this is the view taken of this fact in Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129. In that case a promissory note was indorsed specially thus: "For value received, I order the contents of the note to be paid to A. B., at his own risk." Two points were ruled: (1) That in an action on such a note, by the indorser against the maker, the promisee is a witness to prove the execution of the note. (2) Which, I take it, is the case

[24] Part of the opinion is omitted.

here, such special indorsement transfers the property of the note, with its negotiable quality, to the indorser.

There seems to be no question that there was a consideration passing between the present holder and the payee. * * *

Judgment affirmed.

IV. Conditional Indorsement.

ROBERTSON v. KENSINGTON et al.

(Court of Common Pleas, 1811. 4 Taunt. 30.)

This was an action of assumpsit, and the first count in the declaration was on a bill of exchange, of which the following is a copy, viz.

"Edinburgh, 18th Nov., 1808.

"£180. sterling. At 45 days after date, pay this first of exchange, to the order of Mr. Robert Robertson, £180. sterling, value received, which place to account, as advised. W. Forbes, J. Hunter & Co.

"To Messrs. Kensington, Styan & Adams, Bankers, London.

"Accepted, Kensington & Co. Entered, P. J. Raeburn.

Indorsed: "Edinburgh, 19 Nov. 1808. Pay the within sum to Messrs. Clerk & Ross, or order, upon my name appearing in the Gazette as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date. R. Robertson." "Clerk & Ross." "J. Tindale." "Thomas Eyre & Sons." "Thomas Nelson." "Dudding & Nelson." "Bank of England."

The plaintiff declared as payee, against the defendants as acceptors. The declaration also contained counts for money had and received by the defendants to the use of the plaintiff, for money paid by the plaintiff to the use of the defendants, on an account stated, and for interest.

The plea was the general issue. At the trial of this cause before Mansfield, C. J., and a special jury, at the sittings after Hilary term, 1811, at Guildhall, a verdict was entered by consent for the plaintiff for the sum of £180., subject to the opinion of the court on the following case:

The bill, which was for £180., was drawn at Edinburgh on the 18th November, 1808, by Sir Wm. Forbes, J. Hunter & Co., upon the defendants, who are bankers in London, payable to the order of the plaintiff, at 45 days date, for value received. The indorsements by the plaintiff, and by Clerk & Ross, as above set forth, were made before the bill was presented to the defendants for acceptance. The bill was delivered to Clerk & Ross, army agents in Edinburgh, being persons then employed by the plaintiff to procure for him by purchase the commission of ensign above referred to. The bill, with those indorsements upon it, was afterwards presented to the defendants for acceptance, and accepted by them in the usual course of their business as bankers. It was afterwards indorsed and negotiated by the other

persons whose names appear as indorsers, and finally with the Bank of England, who discounted it. At the expiration of the 45 days specified in the bill as originally drawn, and the days of grace, the defendants paid the contents to the Bank of England, who presented it to them for payment. The plaintiff, at the time of drawing the bill, paid the full value for the same to Sir Wm. Forbes, J. Hunter & Co., the drawers, but did not ask, or obtain, their consent, or that of the defendants, the acceptors, to make any alteration in the tenor of the bill by indorsement either as to the condition of the payment, or the extension of time. The plaintiff's name had never appeared in the Gazette as ensign in any regiment of the line.

The question for the opinion of the court was whether the plaintiff was entitled to recover. If he was, the verdict was to stand; if he was not entitled to recover, a verdict was to be entered for the defendants.

This case was argued by Lens, Serjt., for the plaintiff, who contended that it was competent for the plaintiff by this special indorsement to make only a conditional transfer of the absolute interest in the bill, which he had purchased for a full consideration, and had vested in him by the delivery of the drawer. The defendants, by subsequently accepting the bill, had become parties to that conditional transfer, and as the condition had never been performed, the transfer was defeated, and they became liable, after the expiration of the two months, to pay the plaintiff, to whom the property then reverted, the contents of the bill, of which none of the indorsers could enforce payment against the defendants at the 45 days' end, because they had all received the bill subject to the condition, and were bound thereby. He cited Ancher v. Bank of England, Doug. 638.

Shepherd, Serjt., for the defendant, contended that it was immaterial whether the acceptance was before or after the conditional indorsement. The acceptance admitted the handwriting of the drawer, but it did not mix itself with the conduct of the indorsers. It admitted nothing which was on the back of the bill. The whole practice of the courts was accordingly; for in an action against the acceptor it became unnecessary to prove the handwriting of the drawer, but it was necessary to prove the handwriting of the indorser.

THE COURT gave judgment for the plaintiff.

SECTION 4.—TRANSFER BY DELIVERY

MAURAN v. LAMB.

(Supreme Court of New York, 1827. 7 Cow. 174.)

Assumpsit by the plaintiff as bearer, against the defendant, as drawer, of a check on the Bank of America, dated New York, October 21, 1824, for $1,912.02, payble to No. 25 or bearer.

The cause was tried at the New York circuit, March 25, 1826, before Duer, Judge.

It was admitted at the trial that the plaintiff had no interest in the check, but sued for the benefit of Mrs. Remsen, to whom the check belonged, with her consent.

The defendant objected that the action was not sustainable by the plaintiff in his name; but the objection was overruled. Verdict for the plaintiff.[25]

WOODWORTH, J. It is contended that the plaintiff, being a mere agent, and having no interest, cannot maintain this action. It appears that the plaintiff came fairly by the possession; and his name was used for the benefit of Mrs. Remsen, claiming to be the person in interest. The rule is that the bearer of a note or bill payable to bearer need not prove a consideration, unless he possesses it under suspicious circumstances. 1 Chit. on Bills, 51. If a question of mala fide possessio arises, that is a fact to be raised by the defendant, and submitted to the jury. Conroy v. Warren, 3 John. Cas. 259, 2 Am. Dec. 156. In that case, Mr. Justice Kent referred to Livingston v. Clinton, decided July term, 1799, where the law was laid down that, if a note be indorsed in blank, the court never inquires into the right of the plaintiff, whether he sues in his own right or as trustee; that any person in the possession of a note may sue; and he says a decision to the like effect (Cooper v. Kerr) was, in March, 1800, affirmed in the Court of Errors. In Payne v. Eden, 3 Caines, 213, the note was indorsed to the plaintiff. He had no interest, but was merely a trustee for others. No objection was taken to his want of interest. The question was as to the consideration of the note, and, that being illegal, the plaintiff failed. Thompson, Justice, who delivered the opinion of the court, considered the cause in the same point of view as if the original parties were before the court. In consequence of proving that the plaintiff has no interest, the remedy is not defeated; but the defendant is permitted to avail himself of a defense against the original party. It is no answer to say that the defendant cannot plead a set-off against the cestui que trust. It may, in some cases, be a hardship, as such a defense applies to the parties on the record only. The act authorizing a set-off may not be sufficient to meet this case; but the remedy is with the Legislature, not the courts of justice. * * *

New trial denied.[26]

[25] The statement of facts is abridged, and the arguments of counsel and part of the opinion are omitted.

[26] Accord: Cleary v. De Beck Co., 54 Misc. Rep. 537, 104 N. Y. Supp. 831 (1907).

GAGE v. KENDALL.

(Supreme Court of New York, 1836. 15 Wend. 640.)

Error from the Cortland common pleas. Kendall declared in the court below on a promissory note made by Gage, payable to William Castle or bearer. The defendant pleaded the general issue, and gave notice with his plea that he would prove, on the trial, that the plaintiff, at the commencement of the suit, had no title to or interest in the note declared on, but had transferred the same to one Shankland, who was the owner and holder thereof, and that the suit was commenced without the knowledge, consent or authority of the plaintiff. On the trial, the defendant offered to prove the facts set forth in his notice. The evidence was objected to, and rejected by the court. The defendant excepted. The plaintiff obtained a verdict, upon which judgment was entered. The defendant sued out a writ of error.

PER CURIAM. The question is whether the fact that the holder and owner of a negotiable note has prosecuted such note in the name of a stranger, without his knowledge or consent, is a bar to a recovery in the name of such nominal plaintiff.

Perhaps this question cannot be better answered than it has been by this court in Lovell v. Evertson, 11 Johns. 52. The note being indorsed in blank (in this case payable to bearer), the owner had a right to fill it up with what name he pleased, and the person whose name was so inserted would be deemed, on record, as the legal owner; and if not so in fact, he could sue as trustee for the persons having the real interest. But the defendant could have no concern with that question. He was responsible to the person whose name was so inserted in the blank indorsement. It is true, as contended for by the plaintiff in error, that suits should be brought by the persons having the legal interest in contracts; but, in the case of negotiable paper, a suit may be brought in the name of a person having no interest in the contract. He may sue as trustee for those who are interested.

But why should the defendant give himself the trouble to investigate the plaintiff's title? He owes the money to some one. In this case he offered to show that he owed it to Mr. Shankland, who had brought the suit. It is not a case, therefore, of mala fide possession. A recovery in this case in the name of the present plaintiff might be pleaded, with proper averments, in bar of a new suit in favor of any other person. The defendant is not deprived, in such a suit, of any defense which he may have as against the real owner. There is, in principle, no objection to a suit on a promissory note in the name of a nominal plaintiff; nor is there any authority against it. The cases referred to do not sustain the defense. In the case of Olcott v. Rathbone, 5 Wend. 494, it was said the owner of a promissory note, indorsed in blank, can make whom he pleases the holder. The difficulty in that case was that it did not appear that the owner had assigned the note to the plain-

tiff, or had directed that suit. There is no such difficulty here. The defendant's offer was to show that the true owner had himself brought the suit. The case of Waggoner v. Colvin, 11 Wend. 27, when properly considered, is not an authority for the plaintiff in error. That case came up on demurrer. The defendant pleaded that, before the commencement of the suit, the plaintiff had indorsed the note to Stilwell and others and delivered the note to them, who were the true and lawful owners and possessors of the note. The court said that the plea was good, because it showed the legal title out of the plaintiff, but added that, if the suit was brought in the name of the plaintiff for the benefit of the owners, that fact should be replied, and it would be a good answer to the plea—distinctly asserting that a suit may be brought in the name of a person having no interest in the note, if for the benefit and by the direction of the owner.

The court below decided correctly, and their judgment must be affirmed.

Judgment affirmed.

HAYS v. HATHORN et al.

(Court of Appeals of New York, 1878. 74 N. Y. 486.)

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury (reported below, 10 Hun, 511).

This action was upon a promissory note, alleged in the complaint to have been made by the firm of Hathorn & Southgate, payable to the order of defendant, Frank H. Hathorn, and by him indorsed and transferred to plaintiff.

The facts appear sufficiently in the opinion.[27]

HAND, J. In their answer the defendants denied that the note on which the action was brought was ever transferred to the plaintiff or that he was the legal owner or holder thereof. They further denied that the plaintiff was the real party in interest, and alleged that the Saratoga County Bank was the real party in interest and the owner and holder and should be the plaintiff, and that the note was duly transferred to it instead of to the plaintiff.

Upon the trial, the plaintiff having produced the note which was payable to the order of F. H. Hathorn and indorsed in blank by him, rested. The defendants then offered to prove that the note "was not the property of the plaintiff; that the same was never transferred to him; that he was not the real party in interest; that the note was the property of the savings bank, who is the real party in interest." The

[27] The arguments of counsel are omitted.

evidence was objected to by the plaintiff as immaterial and was excluded. This ruling I think was erroneous and renders necessary a reversal of the judgment.

Under the answer and this offer, the defendants unquestionably proposed to show substantially that the plaintiff had no title, legal or equitable, to the note, and no right as owner to its possession. This might have been done by proving that he was the mere finder or the unlawful possessor, or that the right to its possession and ownership was in the bank, to whom they were liable thereon, or in some other way. This they had a right to show.

It may be that, had their offer been admitted, they would have produced in fact no evidence to sustain it or prevent a recovery, but in considering the validity of their exception to the exclusion, we must assume that the evidence would have fully covered the propositions contained in the offer. And, as remarked in the dissenting opinion in the court below, "unless the defendants are to be precluded altogether from giving any evidence of a matter confessedly issuable, I do not see how this offer could be rejected."

The cases relied upon as justifying the exclusion of the evidence do not go that length. In Cummings v. Morris, 25 N. Y. 625, it was held that the maker of a note could not defeat the plaintiff, not a payee, by proof that the consideration of the transfer to him was contingent upon his collecting the note. Such plaintiff was declared to be the real party in interest on the express ground that the transfer was complete and irrevocably vested in him the title to the note. In City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332, there was no question of exclusion of evidence, but all the circumstances being proved, it was held that where the cashier of a bank holding commercial paper, pledged it "duly indorsed" to the plaintiff as security for a loan by the plaintiff to his bank, and it had been actually transmitted under his direction to the plaintiff so indorsed, it was no defense to one admitting his liability upon such paper to show lack of authority in the cashier alone to contract a loan for the bank; or the fraudulent diversion by him of the funds received from the plaintiff on such loan. Some remarks in the opinion in that case, not necessary to the decision, are perhaps too broad to be entirely approved, but it is fully conceded in it that proof that the plaintiff had no right whatever to the possession but was a mere finder or had obtained it by some "positive breach of law" would be a defense.

Brown v. Penfield, 36 N. Y. 473, holds merely that proof, by the party liable on a bill, of gross inadequacy of the consideration for the transfer of such bill to the plaintiff does not impeach the validity of such transfer as to the party so liable.

In Allen v. Brown, 44 N. Y. 228, it was decided that, as against the plaintiff holding legal title to the claim by written assignment valid upon its face, the debtor cannot raise the question as to the considera-

tion for such assignment or the equities between the assignor and assignee.

In Eaton v. Alger, 47 N. Y. 345, the note being payable to bearer and produced by the plaintiff upon the trial, it was proved that the payee had delivered it to the plaintiff upon his undertaking to collect it at his own expense and pay to such payee upon its collection a certain sum of money. This was held to show sufficiently that the plaintiff and not the payee was the real party in interest under the Code.

Sheridan v. The Mayor, 68 N. Y. 30, reiterates the doctrine that, as against the debtor, the plaintiff holding a written assignment of the claim to himself valid on its face, obtained the legal title and was the real party in interest notwithstanding the fact that the assignment was without consideration and merely colorable as between him and the original claimant. Such assignment is expressly declared to protect the debtor paying the assignee against a subsequent suit by the assignor.

In Gage v. Kendall, 15 Wend. 640, the fact that the prosecution of the note was by its owner and holder in the name of the plaintiff, a stranger to it, without his consent or knowledge, was sought to be set up as a defense, but it was ruled out on the ground that the nominal plaintiff need have no title to or interest in the paper sued upon. We apprehend the Code has changed this, and that such facts would now be fatal to an action. Such a plaintiff could not in any view be the real party in interest. Indeed he would not even have manual possession of the paper.

From this glance at the cases, it appears that it is ordinarily no defense to the party sued upon commercial paper, to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor. But, to be entitled to sue, he must now have the right of possession and ordinarily be the legal owner. Such ownership may be as equitable trustee, it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.

As we understand the scope of the offer in the present case, it went to entirely disprove any ownership or interest whatever, or even right to possession as owner in the plaintiff. It should therefore have been admitted. It may be true that the plaintiff, if this note had been delivered to him with the intent to transfer title, might have lawfully overwritten the blank indorsement with a transfer to himself; it is also true that the production of the paper by him was prima facie evidence that it had been delivered to him by the payee and that he had title to it, but the defendants' offer was precisely to rebut this very presumption,

and for aught that we can know the evidence under it would have done so.

The judgment must be reversed and a new trial ordered, costs to abide the event.

PREVOT v. ABBOTT.

(Court of Common Pleas, 1814. 5 Taunt. 786.)

The plaintiff declared on a bill of exchange drawn by the defendant, requiring B. Skinner, 90 days after date, to pay to the defendant or his order £27. 5s. 6d., and averred that the defendant delivered the bill to the plaintiff, and averred an acceptance, presentment for payment, and dishonor. After verdict for the plaintiff, Vaughan, Serjt., obtained a rule nisi in arrest of judgment, upon the ground that no indorsement by the defendant was averred, and that the bill could not pass without indorsement by mere delivery; and on this day, no cause being shown, he made the

Rule absolute.

GROVER v GROVER.

(Supreme Judicial Court of Massachusetts, Middlesex, 1837. 24 Pick. 261, 35 Am. Dec. 319.)

Assumpsit upon a promissory note made by the defendant, and payable to the order of Hiram S. Grover, the plaintiff's intestate.

At the trial, before Putnam, J., it appeared, that in March, 1832, Grover V. Blanchard called to see the intestate. Upon an inquiry being made, whether the intestate had put on record a deed of mortgage given to secure the payment of the note in question, the intestate produced the deed, which had not then been recorded, and the note, and said to Blanchard, "I will make a present of these to you, if you will accept them." Blanchard then took them and put them in his pocket, saying that he would accept them as a token of love, or affection, or respect. Before they parted, Blanchard handed them back to the intestate, saying to him, "You may keep the papers until I call for them, or collect them for me." No assignment was made on the note or mortgage. Afterwards the intestate put the mortgage deed on record. The plaintiff, after the death of the intestate, in October, 1832, took the deed from the register's office, and, having received of the defendant payment of the amount secured thereby discharged the mortgage. Upon the death of the intestate, the note was found in his chest, with his papers; and Blanchard took it, refused to deliver it to the plaintiff, and caused this action to be brought.

The defendant contended: (1) That no valid gift of a chose in action could be made inter vivos without writing; (2) that the name of

the donor, or of the administrator or executor of the donor, could not be used without his consent, in an action brought for the use of the donee; and (3) that the donor could not, by law, act as the agent of the donee to keep the papers or collect the money.

The jury found that the intestate did intend to give the property contained in the note and mortgage, absolutely, to Blanchard.

The whole court were to determine, upon these facts, whether or not the property passed and vested in Blanchard, and whether or not he might maintain this action without the consent of the nominal plaintiff, for his own use, under the facts and circumstances above stated.[28]

WILDE, J., delivered the opinion of the court.

The jury have found that the deceased intended to give the property in the note, and in the mortgage made to secure it, absolutely, to Blanchard; and the question is whether by the rules of law this intention can be carried into effect.

It is objected that no valid gift of a chose in action can be made inter vivos, without writing, and this objection would be well maintained, if a legal transfer of a chose in action were essential to give effect to a gift. But as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect, between contracts and gifts inter vivos. The latter indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent's Comm. (3d Ed.) 438. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale.

The cases favorable to the defense do not depend on the question whether an assignment must be in writing, but on the question whether a legal transfer is not necessary to give validity to a donation of a chose in action. The donation of a note of hand payable to bearer, or of bank notes, lottery tickets and the like, where the legal title passes by delivery, is good, for by the form of the contract no written assignment is necessary; but as to all other choses in action, negotiable securities excepted, it has been held in several cases, that they are not subjects of donation mortis causa, on the ground undoubtedly, for I can imagine no other, that a legal assignment is necessary to give effect to such donations, and the same reason would apply to donations inter vivos.

[28] Arguments of counsel are omitted.

The leading case on this point is that of Miller v. Miller, 3 P. Wms. 356, in which it was held that the gift of a note, being a mere chose in action, could not take effect as a donation mortis causa, because no property therein could pass by delivery, and an action thereon must be sued in the name of the executor. But in Snellgrave v. Bailey, 3 Atk. 214, Lord Hardwicke decided that the gift and delivery over of a bond was good as a donation mortis causa, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile these two cases. The distinction suggested by Lord Hardwicke in the case of Ward v. Turner, 2 Ves. Sr. 431, in which he adheres to the decision in Snellgrave v. Bailey, is technical, and, to my mind, unsatisfactory; and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency; and we think, for the reasons already stated, that the decision in Snellgrave v. Bailey is supported by the better reasons, and is more conformable to general principles, and the modern decisions in respect to equitable assignments. We are, therefore, of opinion that the gift of the note of hand in question is valid; and in coming to this conclusion, we concur with the decision in the case of Wright v. Wright, 1 Cow. (N. Y.) 598, wherein it was held that the gift and delivery over of a promissory note, mortis causa, is valid in law, although the legal title did not pass by the assignment.

It is not necessary to decide whether the gift of the mortgage security is valid, although it is reported to have been said by the Vice Chancellor, in the case of Duffield v. Elwes, 1 Sim. & Stu. 243, that a mortgagor was not compellable to pay the mortgage debt without having back the mortgage estate, and for that and other reasons he decided, that a mortgage was not a subject of a gift mortis causa. This decision, however, was afterwards overruled in the House of Lords (Duffield v. Elwes, 1 Bligh's New R. 497), on the ground that the gift of the debt operated as an equitable assignment of the mortgage. But as we think it clear that the right to maintain this action does not depend on that question, we give no opinion in regard to it.

Another objection is that, if the gift was valid and complete by the delivery of the note, it was annulled by the redelivery to the donor. We think this objection also is unfounded. In the case of Bunn v. Markham, 7 Taunt. 230, Gibbs, C. J., lays it down as a well-settled principle that if, after a donation mortis causa, the donor resumes possession, he thereby revokes and annuls the donation. This is the law no doubt. Whether there may not be an exception to this rule, when the donor takes back the thing given at the request of the donee for a particular purpose, and agrees to act as his agent under circumstances negativing every presumption that he intended to revoke his gift, is a question which it is not necessary now to consider; for the principle has no relation to a donation inter vivos. When such a donation is completed by delivery, the property vests immediately and

irrevocably in the donee; and the donor has no more right over it than any other person. But a donation mortis causa does not pass a title immediately, but is only to take effect on the death of the donor, who in the meantime has the power of revocation, and may at any time resume possession and annul the gift.

The last objection to the maintenance of this action by Blanchard, in the name of the administrator, has been sufficiently answered in considering the first objection. It is contended that the consent of the administrator is necessary. But if an equitable assignment is sufficient to complete the gift, it follows that the administrator is trustee, and cannot set up his legal right in order to defeat the trust. This is fully established by the cases of Duffield v. Elwes, 1 Bligh's New R. 497, Hunt v. Beach, 5 Madd. Ch. R. 351, and Duffield v. Hicks, 1 Dow. 1.

Judgment for plaintiff for the use of Blanchard.[29]

RANGER v. CARY et al.

(Supreme Judicial Court of Massachusetts, Hampshire, Franklin, and Hampden, 1840. 1 Metc. 369.)

Assumpsit on a promissory note for $60, made by the defendants, Cary, Ward & Bond, on the 21st of December, 1836, payable to Baxter Ayres, or order, on demand, and by him indorsed to the plaintiff. The defendants pleaded the general issue, and filed the following specification of defense, viz.: That said note, if made and indorsed as is supposed by the plaintiff, was not indorsed until the same was overdue and dishonored, and that said Ayres, at the time of making said note, was, and hitherto always has been, and now is, indebted to the defendants in a larger sum than the amount of said note, as by their account filed by way of set-off.

At the trial, in the court of common pleas, before Williams, C. J., the parties agreed that it should be taken by the court and jury as true "that the note declared on was made as in the declaration alleged; that it passed, for a valuable consideration, into the hands of the plaintiff, soon after it was made, the precise time, if material, to be left to the jury; that it was not indorsed to the plaintiff until the autumn of 1838; and that, at the time of making the note, and ever since, the said Ayres was indebted to the defendants in a sum over $500, which

[29] Accord: Hopkins v. Manchester, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387 (1889), trover against donee of unindorsed instrument; Esau v. Greene & Co., 94 Wis. 8, 68 N. W. 405 (1896), trover against purchaser of unindorsed instrument.

Compare Day v. Longhurst, 4 W. R. 283 (Ch. Div. 1893); Lawless v. State, 114 Wis. 189, 89 N. W. 891 (1902); Norton v. State, 129 Wis. 659, 109 N. W. 531, 116 Am. St. Rep. 979 (1906).

See Meuer v. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83 (1904) s. c. affirmed 183 N. Y. 511, 76 N. E. 1100 (1905), with respect to the rights of a transferee of an unindorsed check against a certifying bank.

claim has been filed in offset." The only question submitted to the jury was whether said note was overdue and dishonored at the time of its transfer to the plaintiff.

Upon this point, the judge instructed the jury that the burden of proof was on the defendants, and unless the jury were satisfied affirmatively that the transfer of the note to the plaintiff was at least one month after its date, it could not, for the purposes of this trial, be considered as a dishonored note, and the plaintiff would therefore be entitled to a verdict. The judge further instructed the jury that the transfer of said note was to be considered as made and completed, so as to vest the title in the plaintiff, when she paid the consideration therefor, and it was in fact delivered to her, though the indorsement of said Ayres' name was not until long afterwards, and that the burden of proof still remained on the defendants, notwithstanding the evidence, contained in said deposition, as to the time of the indorsement, taken in connection with the other evidence in the case.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to the above direction of the judge.[30]

DEWEY, J. * * * Upon the instruction that the transfer of the note was to be considered as made and completed, so as to vest the title in the plaintiff when she paid the consideration therefor and it was in fact delivered to her, although the actual indorsement was made long afterwards, we have not thought it necessary to decide further than as respects its bearing and effect upon the case now before us. And in reference to the defense here relied upon, and the right to plead in offset such demands as might have been pleaded, if the action had been brought in the name of the payee, the court are of the opinion that the indorsement, when made, should be regarded as relating back to the time when the plaintiff paid the consideration and the note was actually delivered to her, inasmuch as whether the plaintiff had the legal title from the time of the delivery to her of the note, or the equitable title merely from the time of the delivery, and the legal title by a subsequent indorsement, the defense here relied on must be equally unavailing. Here is no question of want or failure of consideration of this note; no offer to prove payment of it; but the defendants rely upon an account filed in offset, in their favor against Baxter Ayres, the payee and indorser of the note, as their only ground of defense to a recovery by the plaintiff.

It was originally a question of much doubt whether, in any case, where an action was instituted on a dishonored negotiable note, in the name of the indorsee, the defendant could avail himself, by way of set-off, of distinct demands he might have held against the indorser; the suit being between other parties than those to the account offered in offset, and the statute, which allows set-off, in its terms embracing

[30] The statement of facts is abridged, and the arguments and part of the opinion are omitted.

only demands between the parties to the suit. The English decisions restrict the defense to a dishonored note within a much narrower ground than that relied on in the present case; holding the plaintiff, in such cases, liable only to the equities arising out of the note itself, or to the allowance of such demands due to the maker of the note as might be found by either express or implied understanding of the parties to have been agreed to be applied in discharge of the same. Burrough v. Moss, 10 Barn. & Cres. 558.

This court, however, after much consideration, in the case of Sargent v. Southgate, 5 Pick. 312, 16 Am. Dec. 409, held that the statute of set-off was a remedial statute and ought to have a liberal construction, and that, in an action by an indorsee against the maker of a negotiable note indorsed when overdue, the maker might file in offset demands he had against the indorser for money due. In that case the note remained in the possession of the payee long after it was dishonored, and the case presented itself under circumstances of equitable defense much stronger than in the case at bar. In Stockbridge v. Damon, 5 Pick. 223, where a note was transferred six years after it was due, and where the indorsement was obviously in fraud of the maker's rights, the court also allowed the demands of the maker against the payee to be given in evidence to defeat a recovery on the note. But the construction of the right of set-off, thus liberal for the suppression of fraud, should not be extended so as to work injustice to a bona fide holder of a note, who became possessed thereof for a valuable consideration, before it was dishonored, and when by subsequent indorsement the legal interest has become vested in him, so that he may enforce the collection of it in his own name.

In the case of a note not negotiable, transferred to a third person, it is, from the very form and nature of the contract, a chose in action to be enforced solely in the name of the payee; and until actual notice of transfer the law requires that all payments and offsets, which may be properly applicable to the same, should be allowed. Not so in the case of a negotiable note, which by its very terms shows that the promise is the subject of transfer and sale, and where no notice of transfer would have been required to be given to the maker, if there had been an actual indorsement before the note was overdue. It is true that in respect to such a note, if there were an attempt to enforce it without indorsement, and in the name of the payee, it might be defeated by an offset, if no notice had been given; but when, by indorsement, the equitable transfer has become a legal one, the case may present itself under a different aspect as to the legal rights of the parties.

If this note had remained in the possession and control of the payee until dishonored, or if it had been fraudulently indorsed to avoid the offset of the maker's demands against the payee, we should have had no hesitation in applying the rule as stated in the cases above cited, and sustaining the defence. But this case shows a bona fide sale of

the note before it was dishonored, for a valuable consideration, and an actual delivery of the same to the plaintiff, and her possession thereof to this time, and her subsequent acquisition of the legal title by the indorsement. If this indorsement had in form been made before the note was dishonored, no question could have been made as to the right of the plaintiff to recover. Having become possessed of the same, at the time and in the manner she did, and having, before the institution of her suit, acquired the legal title, and consequently the right to sue in her own name, the court are of opinion that the plaintiff does not hold this note subject to the demands filed in offset, and to which it would have been liable while in the hands of the payee, and that, for this reason, the defense relied on cannot prevail.

Exceptions overruled.[31]

LANCASTER NAT. BANK v. TAYLOR.

(Supreme Judicial Court of Massachusetts, Worcester, 1868. 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70.)

Contract on a promissory note for $1,000, signed by the defendant, dated April 16, 1866, payable to Jonathan S. Butterick or order, and indorsed by him to the plaintiffs. Trial in the superior court, before Reed, J., who allowed the following bill of exceptions:

"It was conceded at the trial that the defendant wrote his name upon the paper produced in support of the declaration, and that the plaintiffs received the same on April 16, 1866, in payment of a previous note of like tenor signed by the defendant and indorsed by Butterick, which fell due on that day; and there was evidence that by mistake Butterick did not at the time indorse the note declared on.

"The defendant offered to show that Butterick applied to him to sign a note for $100 as an accommodation for Socrates Henry, and that for that purpose he signed a blank note, which Butterick was authorized to fill up as a note for $100 only, but which he in fact by fraud and without authority filled up as a note for $1,000, and indorsed and got discounted at the plaintiffs' bank for his own benefit, and which was the previous note above named.

"The defendant further offered to show that the signature to the note in suit was obtained by Butterick by a like request for his signature to a note for $100 for Henry's benefit, and that he signed his name in blank, and authorized Butterick to fill up the instrument over his signature as a note for $100 only, but that Butterick fraudulently and without authority filled it up as a note for $1,000; that the defendant never received anything on account of this or the previous note; that Butterick never indorsed the note to the plaintiffs till long

[31] Accord: Beard v. Dedolph, 29 Wis. 136 (1871).

after its maturity, and after they had notice of the above facts; and that at the time of the taking up of the first note Butterick was responsible and able to pay the same, and the same could have been collected of him.

"The judge ruled that, if the note was passed and sold to the plaintiffs before maturity, but by mistake was not indorsed, and the bank in consideration therefor relinquished a note for a like amount on which the defendant was legally liable as maker, and the note was afterwards, before action, indorsed by Butterick, the plaintiffs would be entitled to recover, even if the facts offered by the defendant were true; whereupon the defendant submitted to a verdict, and excepted to the foregoing ruling." [32]

FOSTER, J. The rule that the indorsee of a negotiable promissory note, who has taken it before maturity for value and without notice of any want of consideration or other defect rendering it void in its inception, can enforce it against the maker, notwithstanding it was valueless in the hands of the original payee, is founded upon the custom of merchants and the statute of 3 & 4 Anne, c. 9. It is an exception to the general rule of the common law, according to which a written promise can be enforced only in the name of the party to whom it is made, and, if it has been assigned, although the assignee is allowed to bring an action upon it in the name of his assignor, yet he has no greater rights than the assignor possessed, and the instrument remains subject to every defense that would have existed if no assignment had taken place. The ordinary rule applies to all notes which are not negotiable, and to all negotiable notes which are not duly indorsed for value before maturity. A note not negotiable may be assigned and transferred like any other chose in action, but can be sued only in the name of the payee, and is liable to every defense existing against him. A negotiable note not transferred until it is overdue may be sued in the name of the indorsee, but as to defenses must be treated precisely like one not negotiable. And a negotiable note which is transferred before maturity, but not indorsed until afterwards, in our opinion can stand on no better footing. Whoever receives it takes a contract which upon its face shows that it is subject to every defense that could have been made between the original parties. There is no custom of merchants in favor of such an assignee, and no rule of law by which he is entitled to greater rights than the payee. If the contract was originally invalid for want of consideration or other cause, so will it be in any other hands into which it passes before the legal title is transferred by regular indorsement. No such indorsement having been made before the note is overdue and dishonored, any subsequent one takes effect only from its date. There is no doctrine, known to the mercantile law, by which it can relate back to the time of the equitable

[32] Arguments of counsel are omitted.

transfer, and place the assignee in the same position as if he had been before maturity the holder of the note for value.

It is true a distinction between negotiable and nonnegotiable notes has been recognized in regard to the set-off allowed by statute, and, where a negotiable note was transferred for value before it was dishonored, but not indorsed till afterwards, a previously existing set-off of a distinct demand against the payee was not allowed to prevail. Ranger v. Cary, 1 Metc. 369. The set-off of distinct demands is a matter regulated by statute, and not a common-law defense. And the court carefully limit the application of their opinion, saying that "here is no question of want or failure of consideration of this note, no offer to prove payment of it; but the defendants rely on an account filed in offset." This case is therefore no authority against the conclusion to which we are conducted by applying the elementary principles of the law merchant.

The facts in the present action show that the defendant intrusted to Butterick his signature to a blank note, with authority to write over it a note of $100 for the benefit of one Henry; that Butterick fraudulently filled up the note now in suit so as to make it one for the sum of $1,000 payable to his own order, and passed it to the Lancaster Bank in payment of a former note—that is, for a valuable consideration. But Butterick did not then indorse the note; and it remained in the hands of the bank unindorsed till after its maturity. At a later date, when the note was overdue and the bank had notice of all these facts, Butterick did indorse it. Undeniably, if he had done so originally, the defendant would have been liable. Having placed it in the power of Butterick to perpetrate such a fraud, the injury caused by the defendant's own negligence must have been borne by himself, and not by the bank, which was in no fault and guilty of no want of due care. But the defendant is liable only upon and to the extent of the contract which was written, and not for one which might have been, but was not, made. The bank saw fit to take the note, which purported to be in favor of Butterick, without requiring him to indorse it. They therefore took it subject to any defense which might be made to an action in Butterick's name. And the subsequent indorsement does not improve their position. When the note came into the hands of the bank, payable to the order of Butterick and not indorsed by him, the very form of the instrument gave notice that no one could bring an action upon it except in the name of Butterick, and that it was subject to every defense affecting its original validity which could have been made to it while it continued in his hands.

There is a recent English case in which this identical question has been determined by eminent judges, of great experience and authority in mercantile law A check or sight draft, obtained by fraud from the defendant by one Griffiths, was transferred for a valuable consideration to the plaintiff, before dishonor and with no notice to him of the fraud.

But the actual indorsement of the paper was not made till the instrument was dishonored and the plaintiff had notice of its fraudulent origin. On this state of facts, Erle, C. J., said: "The intention, no doubt, was, that the plaintiff should take the instrument as indorsee; but the indorsement was omitted, and whilst it was in the hands of the plaintiff without being indorsed it was as if it had been an ordinary chattel that had passed by an equitable and not by a legal assignment. All the rights, therefore, that the plaintiff had at that time at law were such as Griffiths had, and no more. Then Griffiths, having defrauded the defendant of the bill, could have no right to it as against the defendant. The law relating to negotiable instruments is that the fact of delivery gives to the person who takes the instrument a title which is good as against all the world, notwithstanding there may be some defect in the title of him from whom the bill is taken, provided it is taken by indorsement for value and without notice of the fraud which constitutes the defect in title. Now the title which the plaintiff gained on the delivery of this instrument was not like that which he would have obtained on the delivery of a negotiable instrument not requiring indorsement; it was yet incomplete, but capable of being perfected by indorsement. Before he had obtained the indorsement he was not within the rule of law I have mentioned; and when he did obtain it he had notice that he could not gain any title to the bill on account of the fraud practiced on the drawer." In the same case, Willes, J., said: "The general rule of law is, 'Nemo dat, qui non habet;' but in the case of negotiable instruments, in order that they may circulate freely, and that persons may not on every occasion be put to the trouble of inquiring into their origin and the transactions between the original parties to the bill, there is an exception to the above rule, and a person taking a bill during its currency, for value, and without notice of any fraud perpetrated by him from whom he takes it, is entitled to sue any person whose name is on the bill, notwithstanding that the person against whom he brings his action was originally defrauded of that bill. It is necessary, however, that the bill should have been indorsed to the holder and taken by him during its currency, and not after it became due; for a person who takes a bill in any manner after it has become due takes it subject to all the equities between the antecedent parties. The person who claims the benefit of this law relating to bills of exchange must prove that he is entitled to do so; he must show that he took the bill by indorsement for value and without notice of fraud. This is a doctrine of the law merchant in favor of those who have acquired by their diligence a complete title. The plaintiff has failed to show that he has done so, and cannot now recover upon it." Whistler v. Forster, 14 C. B. (N. S.) 248.

In the opinion of a majority of the court, these citations express with fullness and accuracy the rule, and the limitations of the rule, of the law merchant, which gives to the bona fide indorsee for value before

maturity of a negotiable instrument a better title and a more complete right of action than the original payee of the instrument may have possessed. The learned judge at the trial having proceeded upon a different view of the law, the exceptions are sustained.[33]

FULTZ v. WALTERS.

(Supreme Court of Montana, 1874. 2 Mont. 165.)

KNOWLES, J. The issues in this case are presented by the complaint of the respondent and the demurrer of the appellant. It is an action in equity. The facts set forth in the complaint are to be taken as true. The demurrer admits them. The complaint shows that James Walters, as the agent of Joseph Fultz, deposited in the First National Bank of Helena $3,100, and took a certificate of deposit in his own name from said bank therefor; that the certificate of deposit is now in the possession of Fultz, but that Walters has refused, and still refuses, to make a written indorsement of the same to him; and that said bank refuses to pay the same, for the reason that the said certificate is not indorsed to him, Fultz. The object of the action is to compel the said Walters to indorse this certificate of deposit to Fultz, and, should he fail to do so, that the court appoint a commissioner to make the same; and, further, that the said bank, when the indorsement shall be made, shall be compelled to pay the said certificate. The demurrer was to the point that the complaint did not state equity sufficient to charge the bank. The court overruled the demurrer. The first point we will consider. Does the complaint state facts sufficient to warrant the court in giving the relief demanded against the bank? A certificate of deposit made in the form of the one presented in this action is in effect a promissory note. It is made payable to the order of Walters, three months from date. Morse on Banks, 53, says of instruments of this character: "They have been held to be in fact equivalent to promissory notes. Usually they embody an express promise in terms to pay; but, even if they do not, they are yet the bank's acknowledgment of its indebtedness, and so are of the same effect as if they expressly promised payment. Substantially they resemble promissory notes, and the courts have always inclined to regard them as such, especially when they are made payable otherwise than immediately and upon demand. If they are payable at a future day certain, they are simply promissory notes, neither more nor less."

Upon the same subject, Parsons on Notes and Bills (volume 1, p. 26) says: "There has recently been considerable discussion as to the nature of the instrument in common use among bankers, called a 'certificate of deposit.' It is usually in this form: 'I hereby certify that

[33] Compare Keel v. Construction Co., 143 N. C. 429, 55 S. E. 826 (1906).

Mr. A. has deposited in ——— Bank $1,000, payable twelve months from date, to his order, upon the return of this certificate. [Signed] B., Cashier.' We think this instrument possesses all the requisites of a negotiable promissory note; and that seems to be the prevailing opinion." See, also, to the same effect, Miller v. Austen, 13 How. 218, 14 L. Ed. 119. Being a promissory note, this certificate is negotiable. The bank, then, had no interest in the relief asked against Walters, the indorsement of the same. And it may be needless to remark that this is the only equity presented in the bill for which the plaintiff asks relief. I think, also, that the plaintiff had a speedy and adequate remedy at law against the bank without the indorsement prayed for. The complaint shows that Fultz was the holder of the said certificate, and the real owner of the same. Walters had delivered it to him, and claimed no interest therein. A note may be transferred by assignment as well as by indorsement. And it is not necessary that such assignment should be evidenced by writing. Upon the subject of the assignment of promissory notes, see 2 Pars. on N. & B. 44–54. In this discussion, he lays down the rule: "A note of hand, or a bill of exchange, being, as we have said, itself only a personal chattel, although called and regarded for most purposes as a chose in action, may be assigned by delivery only, without any writing upon it, or on another paper."

The delivery of the certificate to Fultz under the circumstances that appear in the complaint was an assignment of the same. Fultz alleges that he is the holder and owner thereof, and that Walters claims no interest therein. The fact that the certificate was made payable to the order of Walters makes no difference. Promissory notes, made payable to order, may be assigned, as we have seen, by delivery. The words "payable to order" made it negotiable, and made it subject to the incidents which attach to negotiable paper. The words "payable to order," in a promissory note, do not amount to a contract that the payor is only to pay the same when it is indorsed properly by the payee. He is liable to an assignee, as well as to an indorsee. Under our statute, Fultz, being, as he avers, the owner and holder of this certificate, could bring an action thereon in his own name against the bank. Our statutes provide: "Inland and foreign bills of exchange and promissory notes are hereby declared to be negotiable obligations in this territory, and collectible by and in the name of the holders and owners thereof." Cod. St. 385.

Again, the holder and owner of a promissory note is the real party in interest, and hence, under our statutes, the proper person to bring an action on such an obligation.[34]

Did the common-law rule prevail, then Fultz would have a right

[34] Accord: First Nat. Bank v. Moore, 137 Fed. 505, 70 C. C. A. 89 (1905); Andrews v. McDaniel, 68 N. C. 385 (1873); Younker v. Martin, 18 Iowa, 143 (1864); Brown v. Richardson, 20 N. Y. 472 (1859).

to sue the bank, in the name of Walters, for his benefit, and there would be no need of a resort to a court of equity to enforce his rights. For these reasons, we think the court erred in its ruling, as far as the bank was concerned. That there was no equity presented in which it had an interest we think evident. In regard to Walters, had this case been properly presented by the demurrer, or briefs filed in this case, I, for myself, would be inclined to hold that the complaint presented no equity against him. The demurrer does not show wherein there was a misjoinder of parties. The point that the complaint does not show equity sufficient to charge either party cannot be raised on a specification that there is a misjoinder of parties defendant. This point can be raised by our Code only under the specification that the complaint does not state facts sufficient to constitute a cause of action. The other ground specified in the demurrer goes to the point only that the complaint does not state sufficient facts to justify the court in giving the plaintiff the relief he asks against the bank, and does not present the question as to whether or not there was equity enough in the complaint to charge Walters. And there is nothing in the briefs of appellants that present this issue. This court does not feel called upon to rule upon any point, in a case like this, not presented by the exceptions or arguments of counsel.

Considering the premises, the order of this court is that the judgment of the court below be modified, so as to give the relief asked against Walters alone, and that, as to the First National Bank of Helena, the demurrer be sustained and the cause dismissed.

Judgment modified.

FARRIS v. WELLS.

(Supreme Court of Georgia, 1882. 68 Ga. 604.)

CRAWFORD, J. R. C. Farris brought suit against C. W. Wells on two bank checks—each one calling for the sum of $250—drawn by himself (Wells), against the Gate City National Bank of Atlanta, payable to his own order, but not indorsed. The declaration alleged that the said checks were delivered to the plaintiff by the defendant, and upon presentation at the bank for payment were refused on the ground that the said defendant had notified the bank not to pay the same. It was further averred that the said defendant had also refused to pay the same, although thereunto frequently requested so to do. The case was dismissed on demurrer, and the plaintiff excepted.

We know of no exception to the rule that, where an instrument is made payable to order, the indorsement of the payee is necessary to transfer the legal title to another. Without such indorsement the transferee takes it as a mere chose in action, and to recover upon it must aver and prove the consideration. Nothing of the sort being

averred, the demurrer was well taken and properly sustained. Daniel on Neg. Inst. § 664; Story on Promissory Notes, § 121; Story on Bills of Exch. § 200.

Judgment affirmed.

WALTERS v. NEARY.

(Court of Appeal, 1904. 21 Times L. R. 146.)

This was an appeal by the defendant from the judgment of Mr. Justice Phillimore, reported in 20 Times L. R. 555. The plaintiff claimed a declaration that the defendant might be ordered duly to indorse a certain bill of exchange, dated February 2, 1903, drawn by the defendant and payable to his order and accepted by one Chapman, and he also claimed to recover £50., the amount of the bill in question. The defendant denied that the plaintiff was entitled to his indorsement on the bill, or that he was entitled to recover the amount for which it was drawn. In February, 1903, a Mr. Chapman was desirous of raising a sum of money. He got into communication with the plaintiff's solicitor, and it was arranged that if Chapman could procure a bill of exchange for £50., accepted by himself, with the name of a responsible drawer attached, the plaintiff would lend the money. On February 4th Chapman brought to the plaintiff's solicitor a bill for £50. drawn by the defendant and payable to his (the defendant's) order and accepted by Chapman, and upon this being handed to the solicitor the sum in question was advanced. It was not noticed at the time that the bill was not indorsed by the defendant. When this omission was discovered, application was made to him to indorse it, but he declined to do so. The defendant, in his evidence, stated that Chapman brought the bill to him at his office, and he signed his name as drawer and handed it back to Chapman for the purpose of enabling him to raise money upon it, and that he received no value for it. Mr. Justice Phillimore held that the effect of the transaction was that the defendant was the "holder" of the bill within the definition in section 2 of the Bills of Exchange Act, 1882, immediately after it had been accepted by Chapman, and that he transferred the bill by means of Chapman, as his messenger or agent, to the plaintiff, and that the plaintiff, as the transferee, was entitled, under section 31, subsec. 4, of the act, to have the indorsement of the defendant, and to recover against him on the bill. He accordingly gave judgment for the plaintiff for the amount of the bill. The defendant appealed. By section 2 of the Bills of Exchange Act, 1882: "'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." By section 31, subsec. 4: "Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferror had in the bill, and

the transferee in addition acquires the right to have the indorsement of the transferror."

The court dismissed the appeal.

The MASTER OF THE ROLLS[35] said that the appeal failed. The facts were a little unusual. Chapman was in want of a sum of money. He accordingly went to the defendant with the view of raising the money. The course adopted was that a bill was made, of which the defendant was the drawer and Chapman the drawee, and it was drawn payable to the defendant's order. Chapman accepted the bill. It was clear that as between the defendant and Chapman the bill was drawn to assist Chapman in raising the money. The transaction involved permission to Chapman to use the defendant's name on the bill for the purpose of raising money. Therefore when Chapman took the bill to the plaintiff and used it for the purpose of raising money he carried an authority from the defendant to request the plaintiff to advance money to Chapman upon it. Chapman, as the learned judge had found, took the bill to the plaintiff in the capacity of agent for the defendant, and in that capacity he handed the bill to the plaintiff, who gave him value for it. The defendant's indorsement was omitted by mistake. But he transferred the bill for value to the plaintiff. The plaintiff claimed to have the bill paid, and he was met with the difficulty that the bill was payable to the defendant's order, and that the defendant had not indorsed it. The question was whether the plaintiff was entitled in these circumstances to require the defendant to indorse the bill.

It was clear that he was so entitled. The case came exactly within the authority of Watkins v. Maule, 2 Jac. & W. 237. The plaintiff accordingly had a right to have the defendant's indorsement on the bill, and as soon as he obtained the indorsement he would become the holder for value, and he could then sue the accommodation drawer, though he knew when he took the bill that the drawer was merely an accommodation drawer. That was clear from section 28, subsec. 2, of the Bills of Exchange Act, 1882, which provided that "an accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not." It was said, however, that, though the plaintiff became the holder of the bill, he did not become the holder for value. The answer was that value was given by the plaintiff at the defendant's request to Chapman, and therefore the plaintiff became the holder for value. The judgment was therefore right.[36]

[35] Sir Richard H. Collins. The opinions of Sterling and Matthews, L. JJ., are omitted.

[36] See Seeley v. Reed, 28 Fed. 164 (1886).

SUBLETTE et al. v. BREWINGTON et al.

(Kansas City Court of Appeals, Missouri, 1909. 139 Mo. App. 410, 122 S. W. 1150.)

BROADDUS, P. J. This is a suit to restrain defendants from disposing of a certain promissory note, and asking for its cancellation. On January 8, 1906, the plaintiffs applied to E. L. Hilbert to procure for them a loan of $1,000, for the period of one year. For the purpose of obtaining the loan, they executed and delivered their promissory note for said sum of $1,000, due in one year, payable to the order of said Hilbert. Hilbert, with one of the plaintiffs, applied to several persons to get them to advance the money on the note, but failed to get such advance. The plaintiffs then went home. Afterwards communication by telephone was had between the plaintiffs and Hilbert as to whether the latter had succeeded in securing the loan. The matter was left in this condition until in April, when plaintiffs, according to their statements, saw Hilbert for the purpose of taking up the note when he informed them that he had destroyed it. Thereafter, on the 2d of October, 1906, several months before the maturity of the note, Hilbert borrowed from defendants $814, and executed his note to them for that amount and turned over to them the note in suit, without indorsement, as collateral security. The defendants took the note in good faith in the belief that Hilbert was its owner. The judgment of the court was for the defendants, and plaintiffs appealed.

The note in question was a negotiable instrument as defined in section 1, p. 243, Acts 1905 (Ann. St. 1906, § 463–1), entitled "Negotiable Instruments," and is such under the law merchant, and, being payable to order, it did not pass by the mere act of delivery. Section 30, pp. 247, 248, Acts 1905, is as follows: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." Section 31: "The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement." If the case is to be determined by the law governing the transfer of negotiable instruments payable to order, the defendants are holders with notice of whatever equities plaintiff may have had.

The defendants' defense is based upon the ground that, as Hilbert was the agent of plaintiffs, the law merchant does not control, but the question is one of agency. With this view we coincide. That Hilbert was the agent of plaintiffs to negotiate a loan by means of the note is undeniable. His duty was to obtain a loan upon the credit of plaintiffs' note, which as a matter of course would necessarily become the property of whoever could be induced to advance the money on the se-

curity offered. His authority was complete. In effect he was empowered to dispose of the paper as freely as if it had been his own. The face of the paper, in fact, was a notice to strangers that it was his property; and it was not issued in due course of business.

There is no question better settled than that the acts of the agent (within the scope or apparent scope of his authority) are binding upon the principal. We cannot escape the conclusion that the case falls within the rule governing the relation of agent and principal, and that the law merchant does not apply. Furthermore, we are of the opinion that the plaintiffs have no equity as against defendants, and that the transfer to defendants was for a sufficient valuable consideration. It does not lie in the mouth of a party to plead want of consideration where his agent in the exercise of his authority as such deals with a stranger to his prejudice.

We believe the judgment of the court was for the right party, and it is therefore affirmed. All concur.[37]

[37] Accord: Marling v. Fitzgerald, 138 Wis. 93, 120 N. W. 388, 23 L. R. A. (N. S.) 177 (1909).

CHAPTER II

HOLDER IN DUE COURSE

SECTION 1.—VALUE

BAY v. CODDINGTON et al.

(Court of Chancery of New York, 1821. 5 Johns. Ch. 54, 9 Am. Dec. 268.)

The plaintiff being owner of a vessel, employed Randolph & Savage, defendants, who were copartners, to sell her on a credit, and take good notes in payment, and transmit the same to him, with an account of their charges, which he would pay. Randolph & Savage sold the vessel for $3,875, and on the 3d of June, 1819, received the notes of the purchasers, payable in two, three, and four months; some of them being made payable to, and indorsed by, P. Aymar & Co., and the others by J. R. Stewart. On the 12th of June, 1819, Randolph & Savage delivered the notes so indorsed to the defendants, J. & I. Coddington, who were, at that time, as they stated in their answer, under heavy responsibilities for Randolph & Savage, as indorsers of notes for their accommodation, payable at different times, but all subsequent to the 12th of June, 1819, and which they were afterwards obliged to take up, as they fell due, amounting to above $17,000. The answers admitted that Randolph & Savage had stopped payment, when the notes so held by them were to be delivered to J. & I. Coddington.

The defendants, J. & I. Coddington, denied all knowledge of the manner in which the notes had come to the hands of Randolph & Savage, and alleged that they believed that they were the bona fide and exclusive property of Randolph & Savage, that they received these notes with others, as a guaranty and indemnity, as far as they would avail, for their responsibilities, and three days after disposed of some of the notes for cash, and did not know, until several days afterwards, that the notes belonged to the plaintiffs, as stated in the bill. They admitted that, when they so received the notes, Randolph & Savage were not, in a strict, legal sense, indebted to them, but that they were under large gratuitous responsibilities for them.

THE CHANCELLOR.[1] It is admitted that Randolph & Savage held the notes belonging to the plaintiff, and which they transferred to the defendants J. & I. Coddington on the 12th of June, 1819, as agents or

[1] James Kent. The arguments of counsel and part of the opinion are omitted.

trustees for the plaintiff, and that they had no authority to pass them away. It was a gross and fraudulent abuse of trust on the part of Randolph & Savage. The only question now is whether J. & I. Coddington are entitled, under the circumstances disclosed, to hold the notes, and retain the amount of them as against the plaintiff.

Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But the defendants J. & I. Coddington, have not entitled themselves to the protection of holders of that description. The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created or responsibility incurred, on the strength and credit of the notes. They were received from Randolph & Savage, and after they had stopped payment and had become insolvent within the knowledge of J. & I. Coddington and were seized upon by the Coddingtons as tabula in naufragio, to secure themselves against contingent engagements previously made for Randolph & Savage and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration within the meaning or within the policy of the law.

In Miller v. Race, 1 Burr. 452, a bank note was stolen and came to the hands of the plaintiff, and he was held entitled to it. But the Court of King's Bench considered bank notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note, for a full and valuable consideration, by giving money in exchange for it, in the usual course of his business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note. So, in Grant v. Vaughan, 3 Burr. 1516, 1 Black. Rep. 785, a bill of exchange payable to bearer was lost, and the finder paid it to a grocer, for teas, and took the change. There the court laid stress on the facts that the holder came by the bill bona fide, and in the course of trade, and for a full and fair consideration, and that, though he and the real owner were equally innocent, yet he was to be preferred, for the sake of commerce and confidence in negotiable paper. Again, in Peacock v. Rhodes, 1 Doug. 633, a bill of exchange, with a blank indorsement, was stolen and negotiated to a person who took it in the way of his trade, for cloth sold and cash for the balance, and he was held entitled to hold it. Lord Mansfield placed reliance on the circumstance that it was received in the course of trade. It was "by reason of the course of trade, which creates a property in the assignee or bearer," that Holt, C. J. (1 Salk. 126, Anon.), held that the owner of a bank bill, which was lost and transferred by the finder to C., for a valuable consideration, could not maintain an action against C.

It will not be necessary to go further in support of the principle which uniformly pervades the cases upon this point, and I shall conclude with the case of Collins v. Martin, 1 Bos. & Pull. 648, in which it was decided that if bills of exchange, indorsed in blank, be deposited with a banker, to be received when due, and the banker raises money on them, by pledging them to C., and then becomes bankrupt, C. could not be sued by the real owner, as he took them innocently, without knowledge of the previous circumstances. But it is to be observed that C. there advanced money to the banker, on the credit of the bills, and, as Chief Justice Eyre observed in that case, "If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and affected by all that will affect him."

In short, I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it, not only without notice, but in the course of business, and for a fair and valuable consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration bona fide paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

I shall accordingly declare that the defendants J. & I. Coddington are not entitled to the notes or the proceeds thereof, as against the plaintiff, who was the lawful owner of them when they were transferred to those defendants, inasmuch as they did not receive the notes in the course of business, nor in payment, in whole or in part, of any then existing debt, nor for cash or property advanced, or debt created, or responsibility incurred on the credit of the notes. And I shall direct that it be referred to a master to compute the amount of the said notes, with interest thereon from the times they were respectively payable, to the time of making the report, and that all the defendants in the amended bill, or some or one of them, pay to the plaintiff the sum that shall be reported as the amount of the said notes, with interest, as aforesaid, within 30 days after the master shall have made and filed his report, and notice thereof, and of this decree, or that the plaintiff may have execution therefor, against all or either of the said defendants, according to the course and practice of the court. * * *[2]

[2] Affirmed 20 Johns. 637, 11 Am. Dec. 342 (1822).

BANK OF SANDUSKY v. SCOVILLE et al.

(Supreme Court of New York, 1840. 24 Wend. 115.)

This was an action of assumpsit, tried at the Erie circuit in January, 1839, before Hon. Nathan Dayton, one of the circuit judges.

The action was on a note for $500, dated May 11, 1837, made by the defendant Scoville, payable 60 days after date, at the Bank of Buffalo, to the order of the defendant Barton, and indorsed by him and the defendant Mooney. The defense was usury. It was an accommodation note, which had been discounted at an usurious rate of interest by Henry D. Ward, a broker in Buffalo, and by him negotiated to the plaintiffs. Ward, in his deposition, testified that he passed the note to and it was discounted by the plaintiffs in June, 1837, to extinguish a debt due by the witness to the plaintiffs; and again he said the note was discounted by the plaintiffs for his benefit, and the avails went so far to discharge his liability to them. The plaintiffs had no knowledge of the usury. The judge ruled that the plaintiffs were bona fide holders, and entitled to recover. Exception. Verdict for plaintiffs. Defendants move for a new trial.

BRONSON, J. The note was transferred before the usury act of 1837 took effect; the plaintiffs received it in good faith, without any notice of the usury; and the only question is whether they paid a valuable consideration. 1 Rev. St. 772, § 5.

I think they did. It is not the case of a note received in security for a precedent debt, without parting with anything at the time. The note was discounted by the plaintiffs for the benefit of Ward, to extinguish his debt, and the avails went to discharge his liability to the bank. I cannot understand this language as meaning less than that the proceeds of the note were actually applied to the use of Ward. It is the same thing, substantially, as though Ward had first received the money and then paid it over to the plaintiffs, or, indeed, to any other creditor. If Ward's liability was discharged, his debt extinguished, it is impossible to deny that the plaintiffs, in effect, parted with their money, and that Ward received it. In Bank of Salina v. Babcock and Others, 21 Wend. 499, the old notes were charged over and canceled by the bank; and although not actually given up, we held that the bank was a bona fide holder for value of the new note which had been discounted to take up the old ones. The principle of that case is, I think, decisive in favor of the plaintiffs.

We were referred by the counsel for the defendants to the case of Ypsilanti Bank v. Martin and Others, decided on the argument at July term, 1839. I have looked into the papers in that case, and it does not appear that the bank had parted with the proceeds of the note, by either paying over the money to Stevens & Co., or applying it in satis-

faction of their debt. We thought the plaintiffs had not made out that they had in any way paid value for the note, and on that ground the report of the referee was set aside.

New trial denied.

TRADERS' BANK OF ROCHESTER v. BRADNER et al.

(Supreme Court of New York, General Term, 1864. 43 Barb. 379.)

The action is against Lester Bradner and Lewis W. Carroll, makers, as copartners under the firm name of Bradner & Carroll, and the other defendants as acceptors, as copartners under the firm name of Lowrey, Strang & Co., of a draft of $17,000, dated February 6, 1862, payable 90 days after date, to the order of D. Lowrey, indorsed by him, accepted by the drawees and delivered by Lowrey to the plaintiff as collateral security for nine drafts held by plaintiff, to which he was a party, in consideration of plaintiff's agreement to extend the time of payment of the nine drafts until the maturity of the draft in suit. The draft in suit had been delivered to the plaintiff in breach of faith by Lowrey and without any authority on his part from the defendants. The court directed a verdict for the plaintiff, to which the defendants excepted, and the exception was directed to be argued in the first instance at the general term.[3]

JAMES C. SMITH, J. * * * At the time when the bank received the draft in suit, which was between the 19th and 29th days of March, it held nine other drafts, previously discounted by it, seven of which, amounting to $17,000, were drawn by Lowrey, on Lowrey, Strang & Co., and accepted by them, and the other two, amounting to $4,000, were drawn by Bradner & Carroll, on Lowrey, Strang & Co., to the order of Lowrey, and accepted by the drawees. Of these nine drafts, one was to mature on the 29th of March, one on the 9th of May, and the others on different days between those dates. The draft in suit was transferred to the plaintiff as collateral security for the payment of the nine drafts above mentioned, and the plaintiff, in consideration of such transfer, expressly agreed that it would not sue Lowrey, or Lowrey, Strang & Co., upon either of said drafts, until the maturity of draft thus transferred. The judge, at the circuit, held that this agreement for forbearance was a valuable consideration within the meaning of the rule protecting the holder of negotiable paper; and I am of opinion the decision is correct.

It is insisted by the defendants that, as the plaintiff received the draft as collateral security to a pre-existing debt, it is not a holder for value according to the law as settled by the adjudications of the courts

[3] The statement of facts is abridged. The arguments of counsel and part of the opinion are omitted.

of this state. As I understand the numerous reported cases bearing upon this question, they establish the following propositions: (1) The holder of commercial paper, who has received it for an antecedent debt, either as a security for payment, or as a nominal payment, without parting with any security, property or thing of legal value, or giving any new consideration, is not a holder for a valuable consideration. Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342; Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389; Farrington v. Frankfort Bank, 24 Barb. 554. (2) If, however, he has paid value for the paper, or on the credit thereof has relinquished some available security or valuable right, or has expressly assumed some new legal obligation, he is a holder for value, although the paper is available to him as security for a pre-existing debt. Bank of Salina v. Babcock, 21 Wend. 499; Bank of St. Albans v. Gilliland, 23 Wend. 311, 35 Am. Dec. 566; Bank of Sandusky v. Scoville, 24 Wend. 115; Mohawk Bank v. Corey, 1 Hill, 513; Youngs v. Lee, 18 Barb. 187, affirmed 12 N. Y. 551; White v. Springfield Bank, 3 Sandf. 222; Meads v. Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331.

Tested by these rules, the agreement of the plaintiff to give time upon the drafts held by it was clearly a valuable consideration. Not only was it a valid consideration to support the transfer, but it created a new equity between the original parties, and, as it suspended the legal remedy of the plaintiff, the latter could not be restored to as good condition as it was in before the transfer. It operated like a new loan of the sums due upon the drafts, until the maturity of the new security. The transaction was substantially the same as if the old drafts, to the amount of $17,000, had been paid and canceled, and the sum paid had been loaned upon the new draft. Although the plaintiff did not give up the old drafts, it parted with its right of action upon them until the maturity of the new one, and assumed the risk of loss by the insolvency of Lowrey and his firm, in the meantime. And if the agreement to give time included the drafts drawn by Bradner & Carroll, they were thereby released from their obligation upon such drafts, as, on the face of the paper, they were sureties for the acceptors, and it does not appear that they consented to the extension.

The defendants' counsel cites Wardell v. Howell, 9 Wend. 170, and Francia v. Joseph, 3 Edw. Ch. 182, as authorities for the position that the agreement to give time does not constitute a valuable consideration. But I think they are not decisive of the question. In Wardell v. Howell the plaintiffs had sued one Hughes on a note of $178. Hughes offered the plaintiffs that, if they would stop the suit, he would pay the costs and turn out a note in his possession, indorsed by the defendants, for $150, as collateral security for the note they held against him. The plaintiffs acceded to his proposition; he paid the costs and delivered the note in question to them; and they gave him a receipt acknowledging that they had received the note, which, when paid, was

to apply on their note against him. There was no express agreement to extend the time of payment; and none could be presumed, as the agreement was merely that the note should take effect as security. Gahn v. Niemcewicz, 11 Wend. 320; Williams v. Townsend, 1 Bosw. 411. It would have been otherwise, perhaps, if the parties had intended the note to operate as a conditional payment, at the time of the transfer. Myers v. Welles, 5 Hill, 463; Fellows v. Prentiss, 3 Denio, 512, 45 Am. Dec. 484, 2 Am. L. Cas. 420. But, by the terms of the receipt, it was not to be applied until paid. This view of the case was undoubtedly taken by the court. Justice Sutherland, delivering the opinion, said that the prior indebtedness of Hughes, and the discontinuing the suit against him, did not constitute a valuable consideration against the indorser, under the circumstances of the case. But he did not suggest that there was an agreement to extend the time express or implied; nor is there an allusion in the case to the effect of such an agreement by way of constituting a valuable consideration in the sense of the commercial rule. The case of Francia v. Joseph was decided by Vice Chancellor McCoun, so far as this point is concerned, mainly upon a misapprehension, as I conceive, of the ruling in Wardell v. Howell. The decision is entitled to great respect, but as it stands alone, and is not binding upon this court at General Term, we may properly consider the question as an open one.

The plaintiff is to be regarded as a holder for value to the full amount of the draft in suit. As has already been observed, it assumed by its agreement the risk of loss by reason of all the parties to the drafts becoming insolvent during the period for which the credit was extended. If such insolvency had occurred, the bank would be regarded as having paid the full amount of the draft. The result is the same if the transaction is treated as a payment of $17,000 upon the original drafts, and a loan of that amount upon the draft in suit.

I am of opinion the motion for a new trial should be denied.

Ordered accordingly.[4]

[4] "The law is well settled that the acceptance of such a note, on time, though not received as an absolute payment of the original debt, suspends the right of action on the original debt until the note becomes due, or is dishonored. Putnam v. Lewis, 8 Johns. 389; 5 Term R. 513; Edwards on Bills and Promissory Notes, 197, 199, 200; 1 Bing. 100. The debt from Agnew to the plaintiff being due, and the plaintiff, at the time of surrendering the old note, having the right to enforce its payment presently, and which right he relinquished by receiving the note in suit, and his power to collect the original debt from Agnew being suspended until the note in suit should mature, he certainly parted with value, which constitutes a sufficient consideration to make the plaintiff a bona fide holder of the note in suit. Burns v. Rowland, 40 Barb. 369. It is true the plaintiff had Agnew's indorsement upon the note in suit; but this was only a contingent liability at the end of six months, and the plaintiff was bound to protest the note to charge him." Mason, J., in Pratt v. Coman, 37 N. Y. 440, 443.

MOORE v. RYDER.

(Court of Appeals of New York, 1875. 65 N. Y. 438.)

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court upon trial without a jury.

This action was brought upon a draft drawn by J. W. Landen, as agent of the Cooper's Falls Iron Company, upon defendant, James M. Ryder, and accepted by him for the purpose stated in the opinion of Earl, C., wherein may be found a sufficient statement of the facts.[5]

EARL, C. John W. Landen was agent of the Cooper's Falls Iron Company, and as such agent, on the 1st day of October, 1868, he drew the draft in suit on the defendant, Ryder, who accepted the same. The draft was made, accepted and delivered to Landen mainly for the special purpose of paying certain drafts of the iron company which had been previously accepted by Ryder for its accommodation, and which were then held by the Jefferson County Bank. Landen, however, did not take up the iron company's drafts, but transferred and delivered the draft in suit to the plaintiff, who took the same without any knowledge of the purpose for which it was made and accepted. At the time of the transfer to the plaintiff the iron company was indebted to him and Burnham, under the firm name of Moore & Burnham, $723.35; to plaintiff and Kingsbury, under the firm name of Moore & Kingsbury, $272.53; and to plaintiff individually, $110.56—all the debts being past due. The plaintiff received the draft in payment of these debts, and assumed to pay to his partners, Burnham and Kingsbury, their respective shares of the debts. Upon these facts the judge at Special Term found, as a conclusion of law, that plaintiff was a bona fide holder of the draft for value, and entitled to recover against the acceptor, and an exception to this finding presents the only question for our consideration.

This draft, having been fraudulently diverted from the object for which it was made and accepted, can be enforced against the accommodation acceptor only by a bona fide holder for value. This has been so thoroughly settled by repeated adjudications in this state as to need no further discussion. The only difficulty in this and similar cases is to determine what is a parting with value within the meaning of the rule. A mere precedent debt does not make a party taking such a draft a holder for value, whether the draft be taken in payment of the debt or as collateral security therefor. Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342; Wardell v. Howell, 9 Wend. 170; Payne v. Cutler, 13 Wend. 605; Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389; Farrington v. Frankfort Bank, 24 Barb. 555; Huff v. Wagner, 63

[5] The arguments of counsel, and the opinion of Gray, C., who placed the reversal on another ground, are omitted.

Barb. 215; Lawrence v. Clark, 36 N. Y. 128; Pratt v. Coman, 37 N. Y. 440; Weaver v. Barden, 49 N. Y. 286.

The law enables a bona fide holder of negotiable paper, which has been fraudulently obtained, diverted or used, to recover thereon only to protect him against loss, upon the principle that, when one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit the fraud or wrong must bear the loss. In case the holder of such paper has not parted with any value, or incurred any binding obligation, or changed his position to his detriment on the faith thereof, he cannot recover thereon against the party defrauded or wronged.

In this case, plaintiff gave up no security and parted with no value when he received the draft. But it is claimed that he extended the time of payment upon the debt until the maturity of the draft, and that his extension makes him a holder for value. I cannot assent to this. There was no agreement to extend the time of payment, and the receipt by plaintiff of this paper fraudulently diverted would furnish no consideration for such an agreement. If the rule were otherwise, then, in all cases where negotiable paper fraudulently diverted is received in payment of a precedent debt past due, there would be such an extension of time as would make the taker a holder for value. The paper taken must have some time to run or the taker cannot be a bona fide holder, and the claim is that, when such paper is taken in payment of a precedent debt past due, there is such a necessary extension of the time of payment of the debt as to make the taker a holder for value. If this claim be well founded, the rule that one who takes negotiable paper which has been fraudulently diverted in payment of a precedent debt cannot enforce the same against the party wronged by the fraud is of no practical value; and yet the rule has been enforced in many cases. Rosa v. Brotherson, 10 Wend. 86; Payne v. Cutler, Lawrence v. Clark, and other cases above cited.

It is further claimed that the assumption by plaintiff to pay his partners, Burnham and Kingsbury, their shares of the demands against the iron company which were paid by the draft transferred to him, makes him a holder within the rule. He did not in fact pay his partners, and so far as the case shows they did not call upon him for payment. While they could adopt and enforce such a promise made upon a valuable consideration for their benefit, within the rule laid down in the case of Lawrence v. Fox, 20 N. Y. 268, they did not do it, and until they did adopt it, or in some way claim the benefit of it and accept the new debtor in place of the old one as their principal debtor, the original parties to the promise could rescind or modify it; and the obligation of the promisor to the party for whom the promise was made remained imperfect. If they should adopt the promise, they would have to adopt the instrumentalities by which it was obtained; and the plaintiff could defend against them upon the ground that he was induced to make the promise by fraud.

I am also of the opinion that the mere promise of the transferee of such paper does not make him a holder for value, for the reason that the promise is not binding, and cannot, therefore, in a legal sense, subject him to loss. Weaver v. Barden, 49 N. Y. 286, 291, and cases cited. The promise is no more binding than it would have been if it had been made to pay a certain sum of money at some future time to the fraudulent negotiator of the paper. That such a promise made the transferee a holder for value within the meaning of the rule no one would claim.

In any event plaintiff could only be a bona fide holder for value to the extent of the shares of his partners in the debts which he had assumed to pay. Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389; Huff v. Wagner, 63 Barb. 215.

The judgment should therefore be reversed, and new trial granted; costs to abide event.

Judgment reversed.

CURRIE et al. v. MISA.

(Court of Exchequer Chamber, 1875. 10 L. R. Exch. Cas. 153.)

Action by the plaintiffs as bearers of a check drawn by defendant on his bankers, Barnett, Hoare & Co., payable to Lizardi & Co., or bearer, payment of which had been refused by the drawee in compliance with the defendant's instructions. The defendant for the sum of £1,999. 3s. to be paid the 14th February, 1873, had purchased of Lizardi & Co. drafts on their correspondent in Cadiz. On the 13th Lizardi & Co. delivered to the plaintiffs the following instrument:

"London, 14th February, 1873.

"M. Misa, Esq., 41, Crutched Friars: Please to pay to Messrs. Glynn, Mills & Co., or bearer, the sum of nineteen hundred and ninety pounds three shillings, for bills negotiated to you last post.

"£1,999. 3s. F. De Lizardi & Co."

This instrument was stamped as a bill of exchange payable on demand, although it was postdated. At this time Lizardi & Co. were indebted to the plaintiffs, their bankers, in the sum of about £83,500. and were insolvent. On the 14th the defendant was notified that this instrument was in the hands of the plaintiffs, and delivered to them the check upon which this action is brought, receiving from the plaintiffs the instrument above set forth. The plaintiffs credited the check on account of Lizardi & Co.'s indebtedness to the plaintiffs. Before the check was paid by the drawee, the defendant, learning of Lizardi & Co.'s failure, stopped its payment. Subsequently the drafts purchased of Lizardi & Co. were dishonored by the drawee in Cadiz.

It was contended on behalf of the defendant at the trial that there was a total failure of consideration as between the defendant and Lizardi for the check sued on, and that the plaintiffs were not holders thereof for value; but the learned judge ruled upon the above facts

(neither party desiring that any question should be left to the jury) that the plaintiffs were entitled to recover, and directed the jury to find a verdict for the plaintiffs for £2,090., the amount of the check and interest thereon, and a verdict for that amount was thereupon entered, with leave to move to enter a nonsuit.

The Court of Exchequer refused a rule, and the defendant appealed.[6]

The judgment of the court (KEATING, LUSH, QUAIN, and ARCHIBALD, JJ.; Lord COLERIDGE, C. J., dissenting) was delivered by

LUSH, J. This is an action on a check, dated the 14th of February, 1873, drawn by the defendant on Messrs. Barnett, Hoare & Co., for payment of £1,999. 3s. to Lizardi & Co. or bearer. The material plea is the fifth, which alleges that there never was any consideration for the defendant's making or paying the check, and that the plaintiffs have always held the same without having given any consideration.

We think it must be assumed on the facts stated in the case that, if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question therefore is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the check for value.

The material facts bearing on this question may be briefly stated. The defendant had purchased of Lizardi & Co. bills on Cadiz, which were delivered to him on the 11th of February, and which, according to the usual course of business, were to be paid for on the next post day, the 14th. Lizardi was at this time largely indebted to the plaintiffs, who were his bankers, on both his drawing account and a loan account, and he had for several days previously to and again on the 12th of February been pressed for payment or further security. On the 13th he paid in various checks on account of the balance, and at the same time handed to the plaintiffs the document set out in paragraph 13 of the case, which is designated a "bill."

On the morning of the 14th notice of this "bill," described as lying due at the plaintiffs', was left at the defendant's office, and shortly afterwards the check in question was paid in by the defendant to the plaintiffs' bank, and the "bill" given up to him in exchange for it. The amount of the check was, together with the other checks paid in by Lizardi, entered to the credit of Lizardi's account, and a large balance still remained owing to the plaintiffs. Soon after paying in the check the defendant heard that Lizardi had stopped payment, and he at once instructed his bankers not to honor the check. In consequence of this the check was returned from the clearing house in the after part of the day, and on the following morning (the 15th) it was entered in the plaintiffs' books to the debit of Lizardi's account.

[6] The dissenting opinion of Lord Coleridge, C. J., is omitted. The statement of facts is written by the editors. The judgment was affirmed on another ground in 1 App. Cas. 554 (1876).

The court below, in giving judgment for the plaintiffs, proceeded, partly at least, upon the special circumstance that the check was given to take up the so-called "bill," and considered that this of itself formed a sufficient consideration to entitle the plaintiffs to recover. The argument before us, however, was addressed almost entirely to the broader question, namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favor of the plaintiffs, we do not think it necessary to say more, with reference to the special circumstance adverted to, than that we are not prepared to dissent from the view taken upon this question by the court below.

It will, of course, be understood that our judgment is based upon what was admitted in the argument, namely, that the check was received by the plaintiffs bona fide, and without notice of any infirmity of title on the part of Lizardi. We, therefore, for the purpose of the argument, regard the so-called "bill" as merely an authority to the defendant to pay the amount to Lizardi's bankers, instead of paying it to him, and treat the transaction as if the check had been paid to Lizardi, and he had paid it to the plaintiffs, not in order that he might draw upon it, but that it should be applied pro tanto in discharge of his overdrawn account.

It was not disputed on the argument, nor could it be, that if instead of a check the security had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future day implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a check payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had.

We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And upon consideration we are of opinion that it has no foundation either in principle or upon authority.

Passing by for the present the consideration of what is the true ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not follow that the legal element of consideration is

entirely absent where the security is payable immediately. The giving time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Com. Dig. Action on the Case, Assumpsit, B, 1–15.

The holder of a check may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately, he is safe. The maker of the check cannot afterwards repudiate, and claim back the proceeds any more than he could claim back gold or bank notes if the payment had been made in that way instead of by check. This was decided in Watson v. Russell, 3 B. & S. 34, 31 L. J. (Q. B.) 304, with which we entirely agree. In very many—perhaps in the great majority of—cases checks are not presented till the following day, especially where they are crossed, and this usage is so far recognized by law that the drawer cannot complain of its not having been presented before, even though the banker stop payment in the interval. The loss in such a case falls on the drawer of the check, and not on the holder.

It cannot, we think, be said that a creditor who takes a check on account of a debt due to him, and pays it into his banker that it might be presented in the usual course, instead of getting it cashed immediately, does not alter his position, and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over. If this subject were worth pursuing it would not, we think, be difficult to show that there is no sound distinction between the two kinds of securities of which we have been treating. In the course of the argument it was put to the learned counsel for the defendant whether a debtor who gave his own check in payment of a pre-existing debt could defend an action upon it on the ground that the creditor was not a holder for value, and Mr. Watkin Williams admitted that his argument must go to that extent, and yet it has always been the practice to sue in such a case on the check as well as on the original debt, and no such defense has, as far as we are aware, ever been attempted to be set up, certainly not successfully.

But it is useless to dilate on this point, for, in truth, the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in Belshaw v. Bush, 11 C. B. 191, 22 L. J. C. P. 24, as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. This is precisely the effect which both parties intended the security to

have, and the doctrine is as applicable to one species of negotiable security as to another—to a check payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security. The books are not without authorities in favor of this view, although the point has not, as far as we are aware, been directly decided. Story lays it down in his work on Promissory Notes (section 186) that a pre-existing debt is equally available as a consideration as is a present advance or value given for the note, without suggesting any distinction between a note payable after date and one payable on demand; and the cases of Poirier v. Morris, 2 E. & B. 89, 22 L. J. Q. B. 313, Watson v. Russell, 3 B. & S. 34, 31 L. J. Q. B. 304, before cited, Whistler v. Forster, 14 C. B. (N. S.) 248, 32 L. J. C. P. 161, and others, contain clear expressions of opinion the same way.

On the part of the defendant the case of Crofts v. Beal, 11 C. B. 172, 20 L. J. C. P. 186, was strongly relied on, where it was held that a promissory note given by a surety for payment on demand without any new consideration was nudum pactum. It is sufficient to say of that case that the note was payable to the plaintiff, and not to order or bearer, and was not, therefore, a negotiable security. De la Chaumette v. Bank of England, 9 B. & C. 208, appears at first sight to be more in point; but there, although it appeared as between the plaintiff and O., by whom the bank note in question was remitted, that the state of account was in favor of the plaintiff, it is not really so, for the note had not been remitted in payment, but merely for collection as agent, and the court held that under these circumstances the plaintiff had no better title than O.

For these reasons we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the court below ought to be affirmed.

My Brother QUAIN, who concurs in the judgment, desires to add that he does not adopt all the reasoning as to consideration.

BROOKLYN CITY & N. R. CO. v. NATIONAL BANK OF THE REPUBLIC.

(Supreme Court of United States, 1880. 102 U. S. 14, 26 L. Ed. 61.)

Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by the National Bank of the Republic of New York against the Brooklyn City & Newtown Railroad Company, as maker of a promissory note for $5,000, which had been made by the company payable to one of its officers and by him indorsed and delivered to Hutchinson & Ingersoll, a firm of note brokers, for sale for the benefit of the company. Hutchinson & Ingersoll without authority pledged the note, together with other paper, to the plaintiff as collateral security for the repayment of a cash advance of $36,000 made by the plaintiff to them on June 19, 1873. On July 11, 1873, the plaintiff loaned Hutchinson & Ingersoll $10,000. On July 22, 1873, Hutchinson & Ingersoll agreed (antedating the agreement to June 19th) that all collateral which had theretofore been deposited with the plaintiff, including the $5,000 note, should be held by the plaintiff as collateral to the loan of July 11th, and any other loans which the plaintiff might make. Subsequently the $36,000 loan was paid, but $5,136.68 remained due on the $10,000 loan, and the plaintiff claims to be a holder for value by virtue of his position as pledgee of the $5,000 note as security for this balance of $5,136.68. The plaintiff had no knowledge of the breach of trust by Hutchinson & Ingersoll in pledging the note.[7]

Mr. Justice HARLAN. * * * The next proposition involves the right of the railroad company to show as against the bank, that the note was executed and delivered to Hutchinson & Ingersoll for the purpose only of raising money upon it for the company, and that, consequently, they had no authority to pledge it as collateral security for their own indebtedness to the bank. It will have been observed, from the statement of facts, that the note in suit was among those pledged to the bank as security for the call loan of $36,000, made June 19, 1873; that Howes, Hyatt & Co., whose notes had been pledged as security for the call loan of $10,000, made June 19,[8] 1873, having become insolvent, Hutchinson & Ingersoll, July 22, 1873, at the request of the bank, executed the writing, dated June 19, 1873, whereby they pledged all securities, bonds, stocks, things in action, or other property theretofore deposited with the bank, whether specifically or not, as security for the payment of any and every indebtedness, liability, or engagement held by the bank, for which they were,

[7] The statement of facts is written by the editors. The arguments of counsel, part of the opinion of Harlan, J., and the concurring opinion of Clifford, J., are omitted. Miller and Field, JJ., dissented.

[8] Obviously this should be July 11.

or should become in any way liable. Although, therefore, the call loan of $36,000 was extinguished, without resorting to the note in suit, that note, under the agreement made July 22, 1873, stood pledged as collateral security, also, for the $10,000 call loan of July 11, 1873.

The bank, we have seen, received the note, before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defence thereto, and in ignorance of the purposes for which it had been executed and delivered to Hutchinson & Ingersoll. Did the bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defenses which the railroad company may have against the other parties to the note?

This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by Mr. Justice Story, said: "And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of or as security for a pre-existing debt is according to the known usual course of trade and business. And why, upon principle," continued the court, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are

given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

After a review of the English cases, the court proceeded: "They directly establish that a bona fide holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the bona fide holder of a negotiable note, taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of Mr. Justice Catron was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted (Mr. Justice Catron alone excepted), the holder of a negotiable instrument, received before maturity, and without notice of any defense thereto, is unaffected by the equities or defenses of antecedent parties, equally whether the note is taken as collateral security for or in payment of previous indebtedness. And we understand the case of McCarty v. Roots, 21 How. 432, 16 L. Ed. 162, to affirm Swift v. Tyson, upon the point now under consideration. It was there said: "Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt impair the plaintiff's right to recover." 21 How. 438 (16 L. Ed. 162). "The delivery of the bills to the plaintiff as collateral security for a pre-existing debt, under the decision of Swift v. Tyson, was legal." 21 How. 439 (16 L. Ed. 162).

It may be remarked in this connection that the courts holding a different rule have uniformly referred to an opinion of Chancellor Kent in Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268, reaffirmed in Coddington v. Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342. There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the later editions of his Commentaries (volume 3, p. 81, note b), prepared by himself, reference is made to Stalker v. McDonald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389, in which the principles asserted in Bay v. Coddington were re-examined and maintained in an elaborate opinion by Chancellor Walworth, who took occasion to say that the opinion in Swift v. Tyson was not correct in declaring that a pre-existing debt was, of itself, and without other circumstances, a sufficient consideration to entitle

the bona fide holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But Chancellor Kent adds: "Mr. Justice Story, on Promissory Notes (page 215, note 1), repeats and sustains the decision in Swift v. Tyson, and I am inclined to concur in that decision as the plainer and better doctrine." Of course it did not escape his attention that the court in Swift v. Tyson declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt as when transferred in payment or extinguishment of such debt.

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt, or where it is transferred by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer, or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured, or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor, or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due—in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between prior parties to such paper.

Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security merely, without other circumstances, for a debt previously created. · One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in Swift v. Tyson, is that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects—one,

where the paper is received as collateral security for antecedent debts. We concur with the author "that, when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular, and to rest upon a valid consideration." 1 Parsons, Notes and Bills (2d Ed.) 218.

Another ground upon which some courts have declined to sanction the rule announced in Swift v. Tyson is that upon the transfer of negotiable paper merely as collateral security for an antecedent debt nothing is surrendered by the indorsee—that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes upon him no additional burdens, and subjects him to no additional inconveniences.

This may be true in some, but it is not true in most, cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation, imposed by the commercial law, to present it for payment, and give notice of nonpayment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment and due notice in case of nonpayment—an undertaking necessarily implied by becoming a party to the instrument—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. The correctness of this rule is apparent in cases like the one now before us. The note in suit was negotiable in form, and was delivered by the maker for the purpose of being negotiated. Had it been regularly discounted by the bank, at any time before maturity, and the proceeds either placed to the credit of Hutchinson & Ingersoll, or applied directly to the discharge, pro tanto, of any one of the call loans previously made to them, it would not be doubted that the bank would be protected against the equities of prior parties. Instead of procuring its formal discount, Hutchinson & Ingersoll used it to secure the ultimate payment of their own debt to the bank. At the time the written agreement of July 22, 1873, was executed, by which this note, with others, was pledged as security for any debt then or thereafter held against them, the bank had the right to call in the $10,000 loan; that is, to require immediate payment. The securities upon which that loan rested had become, in part, worthless, and it is evident that but for the

deposit of additional collateral securities the bank would have called in the loan, or resorted to its rightful legal remedies for the enforcement of payment. It was, under the circumstances, the duty of the debtors to make such payment, or to secure the debt. It was important to them, and was in the usual course of commercial transactions, to furnish such security. If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. See Bigelow's Bills and Notes, 502 et seq.; 1 Daniel, Neg. Inst. (2d Ed.) c. 25, §§ 820–833; Story, Promissory Notes (7th Ed. by Thorndyke) §§ 186, 195; 1 Parsons, Notes and Bills (2d Ed.) 218, c. 6, § 4; and Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes, where the authorities are cited by the authors. * * *

Mr. Justice BRADLEY. I concur in the judgment rendered in this case, and in most of the reasons given in the opinion. But, in reference to the consideration of the transfer of the note as collateral security, I do not regard the obligation assumed by the indorsee (the bank), to present the note for payment and give notice of nonpayment, as the only, or the principal, consideration of such transfer. The true consideration was the debt due from the indorsers to the indorsee, and the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to, namely, the debt and the obligation to pay it or to secure its payment. If the indorsers had assigned a mortgage for that purpose, the title of the bank to hold the mortgage would have been indubitable. In that case prior equities of the mortgagor might have prevailed against the title of the bank; because a mortgage is not a commercial security, and its transfer for any consideration whatever does not cut off prior equities. But the bona fide transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor by such title and in such manner as appertain to its nature and qualities. Se-

curity for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject.

Judgment affirmed.

SUTHERLAND v. MEAD et al.

(Supreme Court, Appellate Division, First Department, 1903. 80 App. Div. 103, 80 N. Y. Supp. 504.)

Appeal by the defendants, Charles H. Mead and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of November, 1902, denying the said defendants' motion to vacate and set aside a judgment theretofore entered against them in this action, or to modify the said judgment by reducing the recovery to the sum of $150.[9]

HATCH, J. This action was brought to recover upon a promissory note made by the defendant Deshong, upon which the appellants were accommodation indorsers. It appeared upon the hearing of the motion that the defendant Palleske was indebted to the appellants upon a promissory note for the sum of $1,000; that as such note was about falling due, and on the 15th day of April, 1902, Palleske requested the appellants to accept in payment of such note the promissory note executed by Deshong, set forth in the complaint in the action; that they refused so to accept the same unless Palleske could procure it to be discounted, and would deliver the proceeds thereof to the appellants, and for such purpose the appellants indorsed said note in their firm name, and the defendant Palleske took the same, and agreed to return the proceeds thereof to the appellants. Instead of discounting the note, Palleske transferred the same to the plaintiff in the action, who paid thereon the sum of $150 cash, and, as further consideration, took and held the same as collateral security for an indebtedness then due and owing by Palleske to the plaintiff in a sum exceeding $3,000, the whole of which still remains due and unpaid.

This action was brought by the plaintiff to enforce the note. All of the defendants made default in answering. Judgment was thereupon

[9] Part of the opinion is omitted.

entered by the plaintiff for the full amount secured to be paid by the note, with interest. Thereafter the accommodation indorsers, the appellants herein, made a motion * * * to set aside the judgment, or, in the alternative, to modify the same by reducing the recovery upon the note in suit to the sum of $150, with interest thereon from the day of its date. This motion was based upon the facts and circumstances connected with the delivery of the note to Palleske, as has been previously stated, and also upon an affidavit made by the plaintiff in the action that he had only paid to Palleske for the note $150 in cash, and held the same as collateral security for the payment of a pre-existing debt. It was made to appear by the moving papers that the appellants herein were ignorant of the consideration paid by the plaintiff for the note prior to the time when the application was made to open the default when the affidavit was read. Upon learning these facts, the appellants caused an answer to be prepared, setting up the facts and circumstances connected with the delivery of the note, the indorsement by the appellants, the fraudulent diversion of the same by Palleske, and the consideration paid therefor by the plaintiff. This motion, upon these papers, coming on to be heard, was denied, and from the order entered thereon this appeal is taken. * * *

It is said, however, that the negotiable instruments law has changed the rule in respect to what constitutes consideration for a promissory note; it being claimed that a pre-existing indebtedness is a good consideration, and renders the holder thereof a holder for value of a note taken as security therefor, as against accommodation indorsers, even though the note has been fraudulently diverted from the purpose for which it was given, and the indorsers have received no value. Since 1822, when Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342, was decided, it has been the settled law of this state that accommodation makers or indorsers of negotiable paper were not liable to a holder thereof, where the same had been fraudulently diverted from the purpose for which it was made, or the indorsement given, and the holder had received it solely as collateral security for an antecedent debt. Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142. In other words, the surety has the right to impose such liabilty upon his obligation as he sees fit, and he is not to be made liable outside the terms of his engagement in the case of negotiable paper except for the benefit of a bona fide holder, who parted with value and was misled to his prejudice. United States Nat. Bank v. Ewing, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. Rep. 615. Whatever may have been the rule with respect to this question in other jurisdictions, it has been the law of this state, uniformly enforced during this period of time, and still is the law unless the negotiable instruments law (Laws 1897, c. 612) has changed the same. Section 51 of such act provides: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Standing alone, this provision has not changed the existing law. It was always the law of this state that a consideration sufficient to support a simple contract constituted a good consideration for the instrument. This declaration, therefore, upon this subject added nothing whatever to the law as it existed and had existed from time immemorial. So, also, an antecedent or pre-existing debt constituted value and was sufficient in consideration of an instrument, either negotiable or otherwise, as between the parties thereto. Moreover, it was always the law that the actual payment and discharge of a pre-existing debt constituted the same a valuable consideration for the transfer of commercial paper and shut off prior equities existing against it. Such was the rule announced in Coddington v. Bay supra, and has since been enforced by the courts of this state. Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850; Spring Brook Chemical Co. v. Dunn, 39 App. Div. 130, 57 N. Y. Supp. 100; Blair v. Hagemeyer, 26 App. Div. 219, 49 N. Y. Supp. 965. There is nothing contained in this enactment, therefore, which has changed the rule of law respecting the consideration of commercial paper as it had previously existed, and the language of the statute is quite insufficient to annul the rule which has obtained with respect to the fraudulent diversion of commercial paper as against accommodation indorsers thereon. Such rule, therefore, cannot be considered as changed, unless it be by virtue of the other provisions of the statute showing that such defense is cut off and indicating a clear intent to change the rule.

Section 52 of the negotiable instruments law defines what constitutes a holder for value: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." And by section 55 (as amended by Laws 1898, c. 336) an accommodation party is made liable on the instrument to a holder for value, although such holder at the time of taking the instrument knew him to be only an accommodation party. Section 91 defines a holder in due course to be a person who has taken the instrument under the following conditions: "(1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Section 94 defines when the title is defective in the person who has negotiated the instrument, as follows: "When he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Section 95 provides that the holder must have "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." By section 96 the rights of a holder in

due course are defined to be: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." By section 98 it is provided: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It is evident from these provisions that the Legislature did not intend to wipe out the defenses to a promissory note where the same had been procured from the maker by fraud, or where the indorsement had been given for a specific purpose, and a fraudulent diversion of the paper had been had. If the holder took the same with notice of such facts or circumstances as charged him with notice, or if he parted with no value, it constitutes a good defense to such note. As the definition of value for a promissory note has not added anything to the law upon that subject beyond such as was previously recognized, we ought not to conclude that the Legislature intended to change the rule with respect thereto, nor to permit frauds to be perpetrated thereunder. When the Legislature defines a defective title it states in express terms that a fraudulent diversion is such. All of these sections can be harmonized in their entirety, without any subtle refinement of reasoning, by construing section 51 to mean that to constitute an antecedent or pre-existing debt a valuable consideration in support of a promissory note, that had been fraudulently diverted, as valid in the hands of a bona fide holder, the latter must have canceled, and in legal effect paid and discharged, the antecedent or pre-existing debt. By still holding the debt he in fact parts with no value. It was not intended thereby that, where a debt continued to remain in existence and enforceable as such, and the note is taken as collateral security for its payment, such debt undischarged constitutes a valuable consideration, or the holder of the note one in due course as against the accommodation maker or indorser, who has been defrauded by the negotiation of the instrument. We are not to impute to the Legislature an intent to change a rule of law which has existed in uniform course of enforcement for over three-quarters of a century, without a clear and unequivocal expression so to do. The rules of law which have been laid down in England covering such question, or the reasons assigned for a different rule in other jurisdictions in this country, do not furnish controlling reasons for changing the law of this state so as to bring it into harmony with such views, in face of the fact that in the commercial center of this country these rules have been applied for this length of time without damage to business interests or harm to commercial usages, and during its operation a period of commercial activity and prosperity has existed heretofore unknown in the world's history.

We may take judicial notice that the commission appointed to revise and codify the statutes was created in the main to codify existing laws and not make new rules; and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of 80 years and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such a body. The harmony of these provisions of the statute is in no measure disturbed by a construction which causes them to read that an antecedent and pre-existing debt must be paid and discharged in order to constitute the holder of commercial paper, which has been fraudulently diverted, a bona fide holder and, as such, capable of enforcing the same as against the accommodation maker or indorser. Merely taking such paper as collateral security for the payment of a pre-existing or antecedent debt does not constitute such debt value within the meaning of this statute. This matter does not seem to have been the subject of discussion, beyond that had at Special Term in the case of Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, where a different rule was laid down. The authority cited therefor in the opinion is contained in the reviser's note by the author of the law (see Crawf. Neg. Inst. Law, 30) in which it is stated that section 51 was designed to change the rule in Coddington v. Bay, supra, and the opinion of the late James W. Eaton, Esq., instructor upon the law of bills and notes in the Albany Law School, wherein he says in his published edition of the negotiable instruments law (Eaton & Greene, Neg. Inst. Law, 43), in referring to section 51: "It is to be inferred that the above statute extends the New York rule to include instruments given merely as collateral security."

We are not disposed to adopt this construction of the law. Settled principles ought not to be overturned by imputing a legislative intent where the language upon which it is based is equivocal in expression and when the language used which it is claimed changes the rule may be naturally harmonized with the decisions of the courts which have settled the law plainly and conclusively and with respect to which commercial dealings have been governed in this state for over eighty years. But, even though we should be wrong in our construction of this statute, nevertheless it does not change the rule of law to be applied in the particular case. As we have seen, by section 98, above quoted, the burden is placed upon the holder of every promissory note fraudulently diverted to show that he, or some person under whom he claims, acquired title thereto as a holder in due course. Nothing which appears in these papers tends to controvert the fact that the note in question was fraudulently diverted. The proof upon such subject, submitted in the moving papers, is clear and unequivocal. The answer sets it up as a defense. Before the plaintiff, therefore, could recover, he must show that he or some person under whom he claims acquired the paper in due course and without knowledge of any infirmity attending upon it. Under the pleadings an issue of fact upon this question may be pre-

sented, and these appellants are not to be made to suffer through the fraud that has been perpetrated upon them if the plaintiff had notice of such fact, and the appellants ought to have an opportunity to be heard upon this subject. * * * Order reversed.[10]

GROCERS' BANK v. PENFIELD.

(Court of Appeals of New York, 1877. 69 N. Y. 502, 25 Am. Rep. 231.)

See ante, p. 273, for a report of the case.

ALLAIRE v. HARTSHORNE.

(Court of Errors and Appeals of New Jersey, 1847. 21 N. J. Law, 665, 47 Am. Dec. 175.)

GREEN, C. J.[11] * * * The third and last error relied upon for reversal is that the judge charged the jury "that, if they believed any consideration passed of any value from the said Richard S. Hartshorne to the said Pettis for the note, they should find in favor of the plaintiff for the whole principal and interest of said note," and that the jury found accordingly.

The action is by the indorsee against the maker of a promissory note. The note was given by Allaire to Pettis, for a specific purpose, viz., the renewal of an acceptance by Allaire of a draft of Pettis for $1,500, given in payment of iron sold and delivered by Pettis to Allaire. The note was not so appropriated by Pettis, but was indorsed to Hartshorne as collateral security for a check of Thomas Hegeman for $750 (as is conceded by both parties), and also (as is insisted by the plaintiff) to secure a debt of $400, previously due from Pettis to Hartshorne.

Hartshorne is a bona fide holder of the note for value, and is entitled to all the immunity and protection which that character can give. But he holds the note, it is not denied, as collateral security for a less amount than purports to be due upon its face. The question presented is simply this: In an action by a bona fide holder of a promissory note, who received it as collateral security for a less sum than the

[10] Accord: Roseman v. Mahony, 86 App. Div. 377, 83 N. Y. Supp. 749 (1903); Bank v. Waydell, 103 App. Div. 25, 92 N. Y. Supp. 666 (1905).

Contra: Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606 (1899); Payne v. Zell, 98 Va. 294, 36 S. E. 379 (1900); Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822 (1901); Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522 (1906), semble; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37 (1907), semble. See, also, In re Hopper-Morgan Co. (D. C.) 154 Fed. 249 (1907); Id. (D. C.) 156 Fed. 525 (1907); Am. Bank v. McComb, 105 Va. 473, 54 S. E. 14 (1906).

[11] The facts sufficiently appear in the opinion, all of which except that part relating to the third assignment of error, together with the statement of the case, is omitted.

amount due upon the note, the note being without consideration and invalid as between the original parties, can the holder recover more than the amount which he had advanced, or for which the note is held as security? I speak not now of the rights of a bona fide purchaser of a note. It is admitted that the plaintiff obtained the note in question, not as a purchaser, but that it was transferred to him as security merely, for a specific sum, less than the amount of the note.

For the purpose of this inquiry, it may be assumed that the plaintiff has shown a clear right to recover upon the note in question the sum of $1,150, with interest. He claims no more as due to himself. He admits that for the amount recovered beyond that sum he stands as trustee for the party really entitled to the money. As between the original parties, Allaire and Pettis, the note is worthless. It was given to Pettis for a specific purpose, and by him misappropriated. He gave no value for it. If the suit were in his name, no recovery could be had. Hartshorne, as a bona fide holder for value without notice, may recover the amount due him upon the note. But shall he have judgment for the surplus beyond his claim? If he do, then by the judgment of this court Allaire is compelled to pay money which it is conceded he is not bound in law to pay, and which is due to no one. Not due to Pettis; in his hands the note is valueless. Not due to Hartshorne; he does not pretend to have a claim to it.

The judgment then is rendered against the defendant for an amount which he is not bound to pay, in favor of the plaintiff who disavows all claim to the surplus, after satisfying his demand, to be held in trust, either for a party who in his own name never could recover, or in trust for the defendant himself. And not only does Hartshorne thus recover money which he does not claim; not only is Allaire compelled to pay money which he does not owe; but he pays it under circumstances which preclude all possibility of effectual redress.

Suppose the money recovered upon this judgment—how is Allaire to be indemnified? Can he file a bill in equity, or institute proceedings at law to recover back from Hartshorne money which he has recovered of Allaire himself upon verdict and judgment? He might indeed look to Pettis for the misappropriation of the note; but Pettis is bankrupt.

But admitting that either a court of law or of equity may interfere to protect the rights of Allaire; to what protection is he entitled? What sum shall be retained? Was the note taken and held by the plaintiff to secure $1,150, as was insisted by him—or only $750, as admitted by the defendant? This is a point upon which there is conflicting evidence, and upon which the parties were entitled to the verdict of a jury.

The justice and right of the case manifestly require that judgment should be rendered only for the amount actually advanced by, or secured to, Allaire, upon the transfer of the note to him. Is such a judgment open to any valid objection? Is it in violation of legal principle, or in conflict with authority?

It is said in the first place that the note is a unit, that a recovery upon it is an entire thing, and that different recoveries cannot be had upon the same note, by different claimants against the same party. The principle is sound, but it assumes as true the very question in dispute. If there be a further valid claim by Pettis upon this note, it is not denied that judgment should be rendered for the whole amount due. But that is the very fact in dispute, and which Allaire insists that he should have been permitted on the trial to disprove.

The true distinction is clearly stated by Lord Kenyon, in Wiffen v. Roberts, and has been repeatedly recognized in the later cases. If the note is valid as between the original parties, if the amount of the note is actually due from the defendant to any party (no matter to whom), the indorsee, though he has not given the full value, may yet recover the whole, and retain the overplus above the sum claimed by him, as trustee for the party beneficially entitled. And this upon the plainest principles of justice. The defendant owes the whole debt. It is immaterial to him in whose name the recovery is had. The legal ownership of the note is in the plaintiff; he is entitled to recover all that is due upon it; no injustice is done to any party. But where the note, as between the original parties, is without consideration, either as being accommodation paper, or as having been misappropriated, there a bona fide indorsee for value will recover upon it only the amount he has actually paid, provided there be no other party in interest. Wiffen v. Roberts, 1 Esp. 261; Jones v. Hibbert, 2 Stark. 204; Williams v. Smith, 2 Hill, 301.

It is said that in Wiffen v. Roberts, and in Jones v. Hibbert, the note was an accommodation note, transferred to the indorsee with knowledge of its character. But that circumstance surely does not impair the force of the authorities upon the point in question. In each case, as in the present, the paper was invalid as between the original parties, for want of consideration. It was held available in the hands of the indorsee for the amount actually advanced by him, and for no more.

The case of Williams v. Smith was (like the present) a case of the misappropriation of the note by the party in whose hands it was placed for a special purpose. The case differed from this, in that the action was brought both against the makers and indorsers. Here the payee is not a party to the suit; and it is objected that his rights, as against Allaire, should not be concluded in a suit to which he is not a party. The answer to this objection is obvious. He stands in the position of every indorser, liable to have his rights affected in an action brought by the indorsee. The indorsee is the legal owner of the note, and the rights of all previous indorsers are liable to be affected and concluded by his acts. If the indorser retains an interest in the note, the indorsee is his trustee and representative, with full power to conclude the rights of the indorser, but liable for any abuse of his trust.

It is said again that the indorsee may recover the full amount whereever there is some person to receive the overplus; that in Williams v.

Smith the indorser being a defendant in the suit, there was not one to receive the overplus, other than the defendant; and that therefore that case is no authority in the present. The true statement of the principle is that the plaintiff can recover, beyond the amount actually due to himself, only where there is some person, other than the defendant, entitled to receive the overplus. 1 Saund. Pl. & Ev. 280; Pierson v. Dunlop, Cowp. 571.

That we apprehend to be precisely the position of the present case. If the plaintiff recovers beyond the amount due him, there is no person entitled to the surplus but the defendant himself.

The rule that the bona fide holder of accommodation paper shall recover, in an action against the maker, only the amount actually advanced, is well settled. Edwards v. Jones, 7 Car. & P. 633, 2 Mees. & W. 413; Robins v. Maidstone, 4 Ad. & El. N. S. 811; Chitty on Bills (8th Ed.) 81; Sedgwick on Damages, 241. The principle is applicable to the present case.

The instruction to the jury was erroneous. The defendant was entitled to show that as between himself and Pettis the note was without consideration, that the plaintiff paid only part value for it, and upon such proof the verdict should be for the amount actually due the plaintiff, and no more.

The judgment must be reversed, and the record remitted to be proceeded in according to law.

In this opinion the court unanimously concurred, except that the chancellor declined expressing any opinion upon the second error assigned.

Judgment reversed.[12]

GAUL v. WILLIS.

(Supreme Court of Pennsylvania, 1856. 26 Pa. 259.)

This was an action on a promissory note, by Benjamin B. Willis against Frederick Gaul, the maker. William C. Rudman, on behalf of the defendant, filed an affidavit of defense, as follows: "This deponent, being anxious to borrow money, requested Frederick Gaul, the drawer, to lend him a note of $2,000, now sued upon in this case, which he consented to do, and did without any consideration whatever, and solely for the accommodation of the deponent; that the said note, so loaned by the said Frederick Gaul, was placed by the deponent in the hands of his broker, who, as deponent's agent, and for deponent's use, on or about the day of the date thereof, negotiated it for the sum of $1,820 and no more, being at the usurious rate of 1½ per cent. per month on the face of the note, which sum his said broker paid over to

[12] Accord: Brown v. James, 80 Neb. 475, 114 N. W. 591 (1908).

deponent, deducting his commissions, and the same was used by this deponent, and this deponent believes and expects to be able to prove on the trial of this cause that the plaintiff obtained the said note at the said usurious rate at or about the date thereof." And also a supplemental affidavit as follows: "That the promissory note sued upon was discounted for the said William C. Rudman by Messrs. Drexel & Co., and by them passed to the plaintiff at the time and rate specified in the original affidavit of defense in this case, as this affirmant is informed and truly believes and expects to be able to prove on the trial of this cause."

The court rendered a judgment for the plaintiff, and the prothonotary liquidated the amount due at $2,022.60½. It was assigned for error that the court erred in entering judgment for the plaintiff below.[13]

LEWIS, C. J. Frederick Gaul, the defendant below, loaned his note to William C. Rudman, for the purpose of enabling the latter to raise money by the sale of it. The note was drawn in the usual form of negotiable instruments, and expressed on its face to have been given for "value received," although there was in fact no debt due from Gaul to Rudman. Rudman indorsed the note, and sold it to Drexel & Co. They, in turn, disposed of it to Benjamin B. Willis, at a discount equal to 1½ per cent. per month. Neither Drexel & Co. nor Willis had any knowledge of the purpose for which the note was given. They had a right to put faith in the representation, on the face of the paper, that it was given for a valuable consideration. As against the parties who made that representation the note must be held to be as they represented it. This is a principle of equity applicable to all business transactions; but it is so indispensable, in the transfer of negotiable securities, that a party to such an instrument cannot be received, even after a release, to give evidence to invalidate it in the hands of a bona fide holder, on the ground of usury, or for any other cause touching the original consideration. Walton v. Shelly, 1 T. R. 300; Griffith v. Reford, 1 Rawle, 196.

This brings us to the question: Is Benjamin B. Willis a bona fide holder? If he participated in any contrivance to evade the statute against usury, he would not be a purchaser in good faith. But we have already seen that he had no notice whatever of the purpose for which the note was made. He neither loaned nor intended to loan money to Rudman or to Gaul. He had no transaction of any kind with them, or with either of them. His dealings were with Drexel & Co. There was no intention on the part of the latter to borrow, and no engagement to return the money received, or any part of it, or to pay any sum whatever for the use of it. Now was there any intention on the part of Willis to lend money to them? It was a clear purchase of the security, and nothing else. Had he a right to purchase it at a

[13] Arguments of counsel are omitted.

greater discount than 6 per cent.? That he had was fully settled so long ago as 1785. Wycoff v. Longhead, 2 Dall. 92, 1 L. Ed. 303; Musgrove v. Gibbs, 1 Dall. 216, 1 L. Ed. 107.

Although the period of credit given on the instrument is usually spoken of in fixing upon the discount, it is not the only element that enters into the calculation. The value of the security is determined by the present responsibility of the parties bound for it, the probabilities of their continued ability to pay, and their character for punctuality in meeting their engagements. As the parties to the sale of the security were competent to manage their own affairs, their agreement fixing the value of the note, when fairly made, is as binding as any other contract. It is true that if the note was absolutely void there might be an insuperable obstacle to a recovery on it, however fairly acquired. But in this particular the English statutes against usury differ from our own. The former declared that all securities made in violation of them were "utterly void." 13 Eliz. c. 8; 3 Hen. VII, c. 5; 13 Geo. III, c. 63. The latter contains no such provision. The result was that the English courts were bound to declare that all such securities were absolutely void even in the hands of innocent purchasers. But in this state the law has always been that even between the original parties such securities are valid for the real debt and legal interest. The excess cannot be recovered by one who participated in the contrivance to evade the statute, because he has no right to recover at law what the law prohibits him from contracting for or receiving. But as an innocent purchaser of such a security violates no law, he of course is entitled to recover the amount which, on the face of the instrument appears to be due.

The district court was therefore correct in giving judgment for the plaintiff.

Judgment affirmed.[14]

HILTON v. WARING et al.

(Supreme Court of Wisconsin, 1858. 7 Wis. 492.)

The complaint states, on information and belief: That on 3d day of August, 1855, at Berlin, in the county of Marquette, the defendants made their promissory note in writing, whereby they promised to pay Enos Beall or order $1,288.92, for value received, by the 1st day of March, 1857, and then and there delivered the same to said Beall. That on the 15th day of April, 1856, at Berlin, Beall made his promissory note payable to the plaintiff or order, on the 1st day of June, 1856, for $537.22 at 12 per cent. interest. That the said Enos Beall, on the said 15th day of April, 1856, at Berlin, aforesaid, in writing, assigned

[14] Contra: Clark v. Sisson, 22 N. Y. 312 (1860). See Alexander v. Hazelrigg, 97 S. W. 353, 29 Ky. Law Rep. 1212 (1906), post, p. 447, and note 60, p. 449.

and delivered the said promissory note of said defendants, George D. Waring and Elliot Reed to the plaintiff, as collateral security for the payment of the said sum of $537.22, and interest at the rate of 12 per cent. per annum, according to the conditions of the said promissory note, made and delivered by the said Enos Beall to the plaintiff, on the said 15th day of April, 1856. That the said defendant George D. Waring had notice, and the plaintiff believes that Elliot Reed also had notice, of the assignment to the plaintiff as collateral security of said promissory note, made and delivered by them to the said Enos Beall, before the maturity thereof.

The plaintiff, upon his knowledge, says: That he is now the lawful owner and holder of the said promissory note, made and delivered by the said Enos Beall to the plaintiff, on the 15th day of April, 1856, at Berlin, aforesaid, whereby on the 1st day of June, 1856, he promised to pay to the plaintiff, or his order, the sum of $537.22 and interest, at the rate of 12 per cent. per annum for value received, and that the said Enos Beall is justly indebted to him thereupon in the sum of $537.-22, principal, together with interest thereon from the 15th day of April, 1856. That, though the said promissory note, made and delivered by the said defendants to the said Enos Beall, and by the said Enos Beall assigned and delivered to the plaintiff, became due before the commencement of this action, yet they, the said defendants, have not paid the same to the plaintiff, or any part thereof.

And the plaintiff further says that he is now the lawful holder of the said promissory note of the defendants, made and delivered by them to the said Enos Beall on the 3d day of August, 1855, and by the said Enos Beall, as aforesaid, on the 15th day of April, 1856, assigned to the plaintiff as collateral security, and that the defendants are indebted to him, by virtue of said assignment and delivery by said Enos Beall of said note of defendants, thereupon in the sum of $1,288.92, principal, together with interest thereon from the 1st day of March, 1857. Whereupon the plaintiff demands judgment, etc.

The defendant demurred to the complaint, on the ground, first, that it did not set forth facts sufficient to sustain a cause of action; and, second, for that it appears on the face of the complaint, that there is a defect of parties thereto, viz.: That Enos Beall is a necessary party defendant to the action. The demurrer was sustained, and the plaintiff appealed.

Cole, J. The objections taken to the complaint by the demurrer, are: (1) That it appears upon the face thereof that the same does not state facts sufficient to constitute a good cause of action; and (2) for that it appears upon the face thereof that there is a defect of parties defendant in this: It appears upon the face of the complaint that Enos Beall is a necessary party defendant.

We do not deem it necessary to say more, in answer to the first objection taken to the complaint, than to remark that in our opinion the complaint does state facts sufficient to constitute a cause of action.

Perhaps the complaint unnecessarily sets forth the interest which Hilton, as pledgee, has in the note of the defendants. Being the bona fide holder of that note, he might undoubtedly have brought his action upon it, and recovered judgment for the amount due thereupon, regardless of any interest the pledgor, Beall, might have in the proceeds after the payment of the note which he had given to Hilton. But the fact that the complaint does disclose the true nature of the transaction, and that Hilton took this note as collateral security for the one which Beall had given him, by no means renders the complaint bad.

Neither can we conceive that it was necessary to make Beall a party to this action. It appears he had given a note to the appellant for $537.22, and to secure the payment of it had turned out the note upon which the suit was brought, as collateral security. What earthly necessity could there be of making him a party to this action? None whatever. He had a residuary interest in the note, to be sure; for, if Hilton realized more than his debt from the security, he would be compelled to account to Beall for the overplus. But it was not necessary that he should be a party to the action to collect the amount of the respondent's note. All the interest he had in that matter was that they should pay their note with the least unnecessary delay.

The order of the circuit court sustaining the demurrer must be reversed, and the cause remanded to the circuit court for further proceedings according to law.[15]

[15] Accord: Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042 (1901), where the plaintiff was the indorsee of the payee, taking the instrument as collateral to a pre-existing debt of the payee. But see Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109 (1905).

In Black v. Bank, 96 Md. 399, 416, 417, 54 Atl. 88 (1902), the court said: "Section 45 provides that, where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. But, apart from these considerations, the plea states a case which does not disentitle the plaintiff to recover, since it alleges that the notes were delivered by the association to the Old Town Bank, 'as collateral security for advances to be made by it to the association'; and in Maitland v. Citizens' Bank, 40 Md. 562, 17 Am. Rep. 620, it is said that 'every person is within the rule, and entitled to the protection of a bona fide holder for value, who has received the note in payment of a precedent debt, or has taken it as collateral security for a precedent debt, or for future as well as past advances.' The Old Town Bank, therefore, as well as the plaintiff, is presumed to be a holder for value; and in Cover v. Myers, 75 Md. 419, 23 Atl. 850, 32 Am. St. Rep. 394, the court said: 'Where a negotiable instrument is originally infected with fraud, invalidity, or illegality, the title of the original holder being destroyed, the title of every subsequent holder which reposes on that foundation, and no other, falls with it. But if any subsequent holder takes the instrument in good faith, and for value, before maturity, he is entitled to recover on it; and so any person taking title under him may recover, notwithstanding such latter holder may have knowledge of the infirmities of the instrument; and all that is required of the holder in such case is that it be proved that he, or some preceding holder or indorsee, under whom he claims, acquired title to the paper before maturity, bona fide, and for value.' And this view of the law has since been formulated in section 77 of article 13."

See, also, Jennings v. Carlucci (Sup.) 87 N. Y. Supp. 475 (1904); Rogers v. Morton, 46 Misc. Rep. 494, 95 N. Y. Supp. 49 (1905); Rosenthal v. Freedman, 53 Misc. Rep. 595, 103 N. Y. Supp. 714 (1907).

ATLAS BANK v. DOYLE.

(Supreme Court of Rhode Island, 1868. 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219.)

Assumpsit on the check of the defendant on D. W. Vaughan & Co. for $2,000, payable to bearer, and dated June 17, 1867. At the trial of the case before Mr. Justice Potter, with a jury, at the March term of this court, 1868, the plaintiffs produced the check in suit and there rested their case. The defendant then called Thomas H. Brownell, who testified that he was cashier of the Atlas Bank during the year 1867, and as such cashier, received the check in suit from Edward J. Cushing as collateral security towards Cushing's indebtedness to the bank, and that he paid out no money on the check. On being asked, in cross-examination, if the check of Edward J. Cushing, dated June 18, 1867, for $2,000 on the Atlas Bank was not paid on account of the check in suit, he replied that it was not.

The defendant's counsel then moved that the case be sent to an auditor to ascertain the state of the account between Cushing and the bank, claiming that the check in suit having been loaned by the defendant to Cushing without consideration, and by said Cushing pledged to the plaintiffs as collateral security for his indebtedness to them, the plaintiffs could not maintain this action without proof of such indebtedness.

This motion the judge overruled, and instructed the jury that the plaintiffs might maintain their action and recover upon the money counts in their declaration, without reference to the question whether Cushing was or was not indebted to the plaintiffs. Under these instructions, the jury having returned a verdict for the plaintiffs for $2,106, the amount of the check and interest, the defendant now moved for a new trial upon the ground of error in law in said instruction.

POTTER, J. Of the general right of the pledgee to collect notes and securities pledged to him there can be no doubt. If he could collect only the amount for which the paper was pledged, this would render two suits necessary to collect the whole amount of the note pledged. The pledgee can collect the whole, and account to the pledgor for the surplus over his debt.

But with paper known to be accommodation paper the case is different. If, in this case, the pledgee could collect the whole of the maker, he could be obliged to pay the surplus over his own claim to the pledgor, who would be in his turn liable to repay such surplus to the maker. We think, therefore, that in case of accommodation paper pledged the pledgee can recover of the maker only the amount of the debt due him from the pledgor. Jones v. Hibbert, 2 Starkie, 304, 3 Eng. Com. Law, 356; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40; Chitty on Bills, 81; Wiffin v. Roberts, 1 Esp. 261.

On the trial of the case, the defendant claimed that the burden of proof (it being a pledge) was on the plaintiffs to show the amount of the defendant's indebtedness; and the plaintiffs, at the hearing before us, claimed that the defendant was obliged to prove that the debt for which the note was pledged as collateral had been paid wholly or in part.

The holder of commercial paper is presumed to be a holder for value; that is, until the contrary be shown. In the present case, it was proved that the defendant's check (payable to bearer) was pledged by Cushing, to whom it was given, to the plaintiffs for his (Cushing's) indebtedness. This shows a valuable consideration, and makes the plaintiffs holders for value, even if the indebtedness be fluctuating. Byles on Bills, side page 122; Heywood v. Watson, 4 Bing. 496; Chitty on Bills, side page 85; Woodruff v. Hayne, 1 C. & P. 600; 1 Starkie, 483.

It is generally sufficient for the holder of such paper to present it; and it is held to be prima facie evidence that he is a holder for value and to the amount expressed. The burden of proof is indeed on the plaintiff to prove a valuable consideration, but by presenting the paper he makes a prima facie case; that is, a case sufficient to justify a verdict for him if the defendant does not rebut it. But if the defendant does produce evidence to rebut this presumption, the burden is still on the plaintiff, taking all the testimony together, to show a valuable consideration by a preponderance of evidence on his side. Burnham v. Allen, 1 Gray (Mass.) 500; Delano v. Bartlett, 6 Cush. (Mass.) 366 (which criticises and explains 1 Cush. [Mass.] 170); Powers v. Russel, 13 Pick. (Mass.) 69, 76.

But if the defendant, not disputing the original consideration, takes some new ground of defense, for example, payment, failure of consideration, and the like, then the burden is on him to prove this matter of avoidance. Delano v. Bartlett, supra; 3 Phillips on Evidence, side page 161.

In the present case, therefore, it would be sufficient for the plaintiffs in the first instance to produce their check to the jury, which would entitle them to a verdict for the face of it, unless the defendant produced evidence to show that the amount of the indebtedness was either originally less or had been reduced by payment. If he does so, then, taking all the evidence together, the burden of proof would return on the plaintiffs to show themselves entitled to recover the face of the check. Chitty on Bills, side page 638, note "c."

A new trial will be granted, on the defendant's filing an affidavit that he has evidence to show that the amount of Cushing's indebtedness to the plaintiffs was less than the amount of the check.[16]

[16] Accord: Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109 (1905), semble.

LAY v. WISSMAN.

(Supreme Court of Iowa, 1873. 36 Iowa, 305.)

Action upon a promissory note for $150 executed by defendant to J. L. Cory and W. G. Stone, and by them indorsed without recourse. The defendant answered under oath, denying that he signed the note sued on; denying that plaintiff is a bona fide holder thereof; alleging that the same was obtained by fraud, without any consideration, and that plaintiff paid therefor only the sum of $80. Trial by the court. Judgment for plaintiff. Defendant appeals. The material facts are stated in the opinion.[17]

DAY, J. * * * It appears from the evidence that the payee of the note procured it fraudulently and without consideration, and that the plaintiff paid $80 therefor, without any knowledge of the circumstances attending its execution. A question is presented as to the amount plaintiff is entitled to recover; whether the amount of the note, or the sum paid therefor with interest.

It is an elementary principle that the equities existing between the maker and the payee cannot be set up against the indorsee in the ordinary course of business, for a valuable consideration, in good faith, and before maturity.

There is some confusion and uncertainty in the authorities as to whether one who purchases a note for less than its face can be considered a bona fide holder. Bailey v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385, and cases cited. In this state, however, the rule is settled that one who purchases a note at a discount may be a bona fide holder and entitled to recover thereon. Sully v. Goldsmith, 32 Iowa, 397. And this view has the support of both principle and authority. Bailey v. Smith, supra; Gould v. Legee, 5 Duer (N. Y.) 270. The amount of the consideration paid may become important in determining whether the holder is a bona fide indorsee.

Where a note for $300, on a responsible person, and nearly due, was sold for $5, it was held that the indorsee was not a holder in good faith for value, and that he could not recover thereon, the note being without consideration. De Witt v. Perkins, 22 Wis. 473.[18] The amount of consideration paid becomes an important element, in connection with the responsibility of the maker, the rate of interest, the time of maturing, and the circumstance of the transfer in determining the bona fides of the holder. And if he is not a purchaser in good faith, he takes the note subject to the equities growing out of the note, existing between the maker and the payee. When, however, the consideration paid, and the other circumstances of the purchase, show that the in-

[17] Part of the opinion is omitted.

[18] See, also, Smith v. Jansen, 12 Neb. 125, 10 N. W. 537, 41 Am. Rep. (1881); McNamara v. Jose, 28 Wash. 461, 68 Pac. 903 (1902); Lassas v. McCarty, 47 Or. 474, 84 Pac. 76 (1906).

dorsee is a bona fide holder, in the usual course of business, there is no logical principle upon which his recovery from the maker can be reduced below the amount of the note.

The defense that a note has been obtained fraudulently or without consideration does not avail against a bona fide holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defense does avail; for without such defense he would recover the amount evidenced by the note.

There is a class of cases in which the holder has been allowed to recover only the amount advanced upon the note. But it is believed that they will nearly, if not quite, all be found to be cases in which the holder is not a purchaser in the ordinary course of business. Thus in Allaire v. Hartshorne, 21 N. J. Law, 665, 47 Am. Dec. 175, cited in 1 Pars. on Notes and Bills, p. 191, note 1, the note was deposited with the holder as collateral security for a pre-existing debt. The plaintiff was the owner of the note only to the extent of the debt secured. If he had recovered more, he would have held the surplus in trust for the payee. But the payee was not entitled to recover; the note, as between him and the maker, being invalid. Hence it was held, and very properly, that the holder could recover only the amount of his debt. The same principle is involved in Williams v. Smith, 2 Hill (N. Y.) 301; Youngs v. Lee, 18 Barb. (N. Y.) 187; Cardwell v. Hicks, 37 Barb. (N. Y.) 458; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40. In Hubbard v. Chapin, 2 Allen (Mass.) 328, a note was given upon an illegal consideration to one Stone, for the benefit of Mallory. Stone indorsed the note to the plaintiff, who paid but a small sum thereon, and agreed to pay the balance to Mallory. It was claimed that, before paying the balance to Mallory, he had knowledge of the illegality of the consideration. It was held that, if he did acquire such knowledge, he could recover of the maker only the sum paid before he obtained information of the failure of consideration. This case falls under the same principle as those before cited.

It is essential to the utility of commercial paper, as a medium of exchange, that the parties dealing with it, so long as they act in good faith, should be allowed to regulate its value by the responsibility of the parties bound thereby, and all the circumstances attending the transfer; and it would very much lessen the usefulness of such paper, if the purchaser for less than its face, in the ordinary course of business, holds it, pro tanto, subject to the defenses which the maker may have against the payee.

We hold, therefore, that the court did not err in rendering judgment for the amount of the note. This holding is in accord with the general current of decision in this state, upon the subject of commercial paper. See Dickerman v. Day, 31 Iowa, 444, 7 Am. Rep. 156; Loomis & Leroy v. Metcalf & Fuller, 30 Iowa, 382; Sully v. Goldsmith, 32 Iowa, 397; National Bank of Michigan v. Green, 33 Iowa, 140.

Affirmed.

MANN et al. v. SECOND NAT. BANK OF SPRINGFIELD, OHIO.

(Supreme Court of Kansas, 1883. 30 Kan. 412, 1 Pac. 579.)

This was an action on a negotiable promissory note. Trial by jury. The court instructed the jury peremptorily to find for the plaintiff, and of this defendants complain. The note was given in payment of a Champion harvester and cord binder. In the sale of this machine a warranty was given, and the defense was a breach of the warranty, and therefore a failure of the consideration. Upon the trial testimony was offered in support of this defense, and finally it was admitted that the defendants were entitled to a verdict, unless the plaintiff was a purchaser of the note for a good and valuable consideration before maturity, without notice of the failure of the warranty. The note was in form to the order of Amos Whitely, president. It was due January 1, 1882, was indorsed and transferred to plaintiff bank by way of discount. At the time of discount no money was paid directly to the machine company, but the amount of the discount, $142.14, was credited to the account of the machine company. At that time and since, up to the time of the commencement of this action, the machine company carried an average balance of several thousand dollars in the bank. Judgment for plaintiff. Defendants alleged error.[19]

BREWER, J. It will be observed that the bank in fact paid nothing to the company at the time of the discount. It simply credited the company on its books with the amount of the discount, and thereby enlarged the company's account with the bank. It is not a case in which the company's account was overdrawn, and in which it was indebted to the bank, which indebtedness was reduced by the amount of the discount. On the contrary, the bank owed the company, and it simply, by the discount, increased the amount of this indebtedness—an indebtedness which continued until after suit was brought and the bank had full notice of the defense. Now, conceding that the bank was a bona fide holder, that it acquired title in the first instance without any notice of any infirmity, to what extent is it protected? The general rule in such cases is that a bona fide holder is protected to the amount he has paid or lost by virtue of the discount. In the case of Dresser v. Construction Co., 93 U. S. 92, 23 L. Ed. 815, it was held that a bona fide holder of negotiable paper purchased before its maturity, upon an unexecuted contract on which part payment only had been made, when he received notice of fraud and a prohibition to pay, is protected only to the amount paid before the receipt of such notice. In the opinion, which covers simply that point, the authorities are fully cited, and the conclusion reached is the unanimous opinion of the court. In Bank v. Valentine, 18 Hun (N. Y.) 417, it is held that the mere discounting of

[19] The statement of facts is abridged from the opinion, part of which, together with the arguments of counsel, is omitted.

a note and giving a party credit on the books of the bank for the amount thereof does not constitute the bank a holder for value. A similar proposition is laid down in Dougherty Bros. & Co. v. Bank, 93 Pa. 227, 39 Am. Rep. 750.

We do not cite the various cases in suppport of the general proposition, for they are fully cited and discussed in the opinion of the court in 93 U. S. 92, 23 L. Ed. 815, supra. The proposition rests on the plainest principles of justice, and in no manner impairs the desired negotiability and security of commercial paper. Whenever the holder is a bona fide holder, he has a right to claim protection, but protection only to the extent he has lost or been injured by the acquisition of the paper. If he has parted with value, either by a cash payment or the cancellation of a debt, or giving time on a debt, or in any other manner, to that extent he has a right to claim protection; but when he has parted with nothing there is nothing to protect. A mere promise to pay is no payment. He may rightfully say to the party from whom he purchased: "The paper you have given me is valueless, and therefore I am under no obligations to pay." And if the paper be, in fact, valueless, payment cannot be compelled. Now, the relation of a bank to its depositor is simply that of debtor. The bank owes the depositor so much. If the deposit is valueless, its obligation to pay is without consideration, and it may decline to pay. There is nothing in the relation of a bank to its depositor which takes its obligation to its depositor out of the general rule of debtor to creditor.

The case of Bank v. Crawford, 2 Cin. Rep. 125, cited by defendant in error, is a case in which the depositor's account was overdrawn, and the discount, therefore, was practically the payment of an antecedent debt. And in such a case, the bank having taken the paper in payment of an antecedent debt, was entitled to protection to the amount of such debt. Draper v. Cowles, 27 Kan. 484. We therefore think that the bank, having paid nothing at the time of its discount, having simply increased its debt to the depositor, the machine company, and that debt remaining unpaid at the time suit was brought, and it, having received actual notice of the infirmity of this paper, cannot claim the protection of a bona fide holder for value.

We see nothing in the case of Railroad Co. v. Bank, 102 U. S. 14, 26 L. Ed. 61, which conflicts with this conclusion. At least there is nothing in the decision as applicable to the facts of that case which conflicts, nor in the illustrations made by the learned judge who wrote the opinion of the court. And while there are some expressions in that opinion which may seem to conflict, we do not understand that the court means in any way to overrule the prior case in 93 U. S. 92, 23 L. Ed. 815, supra. We think, therefore, the district court erred, in its peremptory instructions, to find for the plaintiff, that the judgment must be reversed, and the case remanded for a new trial. * * *[20]

[20] Accord: Citizens' Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765 (1905); Albany Bank v. Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773

SECTION 2.—NOTICE

BROWN v. DAVIES.

(Court of King's Bench, 1789. 3 Term R. 80.)

This was an action by the indorsee of a promissory note against the maker.

The plaintiff, at the trial before Lord Kenyon at the last sittings at Guildhall, rested his case upon the proof of the maker's and payee's

(1904); Consolidated Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353 (1904); National Bank v. Foley, 54 Misc. Rep. 126, 103 N. Y. Supp. 553 (1907); City Bank v. Green, 130 Iowa, 384, 106 N. W. 942 (1906); McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265 (1907); Hodge v. Smith, 130 Wis. 326, 110 N. W. 192 (1907).

Contra: Ex parte Richdale, 19 Ch. Div. 409 (C. A. 1881). See, also, National Bank v. Silke, [1890] 1 Q. B. 435 (C. A.); Royal Bank v. Tottenham, [1894] 2 Q. B. 715 (C. A.); Capital Bank v. Gordon, [1903] A. C. 240; Blake v. Hamilton Bank, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684 (1908).

Compare Commercial Bank v. Bank, 132 Iowa, 706, 109 N. W. 198 (1907); Fayette Bank v. Summers, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694 (1906), cases where the bank did not give credit, but took for collection.

"It is claimed on the part of the defendants that because there was a balance to the credit of the Delanceys at the plaintiff bank of more than the amount of the note in suit on the respective dates—June 28, 1904, June 29, 1904, April 20, 1905, and May 1, 1905—as found by the trial court, therefore the plaintiff did not purchase and pay for the note June 28, 1904. In other words, that the amount of the note stood to the credit of the Delanceys at the bank without being drawn out by them. But it is undisputed that such balances were subject to check, and simply stated the balances on Delanceys' account at the respective dates mentioned, and had nothing to do with the note in suit, and that such balances varied from time to time and were at times overdrawn. The facts stated make it certain, not only that the plaintiff purchased the note and placed the amount thereof to the credit of the Delanceys in their bank account, less the discount, June 28, 1904, but also that the Delanceys drew out of the bank to their own use the whole of the amount so placed to their credit prior to the time when the plaintiff first learned that the defendants claimed to have a defense to the note. Such being the facts, there can be no question but what the plaintiff became the owner and holder of the note in due course and in good faith and for value before maturity, and hence is entitled to the protection of the law merchant, even if the defendants might have successfully defended against the vendors of the stallion." Northfield Bank v. Arndt, 132 Wis. 383, 112 N. W. 451, 453, 12 L. R. A. (N. S.) 82 (1907).

"The evidence showed that the amount of the note was placed to the credit of Haas in the appellant bank, and that soon thereafter, and on the strength of the credit, the bank obligated itself to honor a check drawn on Haas for $1,000. Notwithstanding this last transaction, it is claimed by the appellee that appellant paid nothing for the note until after it had notice of its infirmities. The giving of credit alone would create the relation of debtor and creditor between the bank and Haas, and nothing more, and the bank would not thereby become a bona fide holder within the meaning of the law. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942. But, if it was true that the bank had assumed a legal obligation to another on the faith of the deposit or credit, it became thereby a purchaser for value. Leach v. Hill, 106 Iowa, 171, 76 N. W. 667." Montrose v. Claussen, 137 Iowa, 73, 76, 114 N. W. 547, 548 (1908).

See, also, Mehlinger v. Harriman, 185 Mass. 245, 70 N. E. 51 (1904).

handwriting. The note appeared upon the face of it to have been drawn on the 6th of October 1788, payable to Sandal or order, and to have become due on the 13th of November. It had Sandal's indorsement upon it, and had been noted for nonpayment. Whereupon the defendant's counsel offered to prove these facts: That Sandal, having indorsed it in blank, delivered it to Taddy, by whom it had been noted for nonpayment. That on the 6th of December Sandal, having been paid by the defendant, the maker of the note, took it up from Taddy, and afterwards, without the knowledge or consent of the defendant, negotiated it to the plaintiff. But his Lordship being of opinion that, unless knowledge was brought home to this plaintiff, it would make no difference between these parties, rejected the evidence, and the plaintiff had a verdict.

Le Mesurier moved in this term for a rule to show cause why there should not be a new trial, in order to let the defendant into proof of the above facts, and cited a case of Banks v. Colwell of Launceston Spring Assizes, 1788, before Mr. Justice Buller. That was an action by the indorsee of a promissory note, payable on demand, against the maker. The defendant there was admitted to give evidence that the note had been indorsed to the plaintiff a year and a half afterwards, and to impeach the consideration by showing that it had originally been given for smuggled goods, and that payments had been made upon it at several times. But though no privity was brought home to the plaintiff, Mr. Justice Buller was clearly of opinion that he ought to be nonsuited; for he said it had been repeatedly ruled at Guildhall that wherever it appears that a bill or note has been indorsed over some time after it is due, which is out of the usual course of trade, that circumstance throws such a suspicion upon it that the indorsee must take it upon the credit of the indorser, and must stand in the situation of the person to whom it was payable, and here it appeared that the consideration was illegal. Therefore he nonsuited the plaintiff. The principle of that case cannot be distinguished from the present, according to which the plaintiff must stand in the situation of Sandal with respect to the defendant, and consequently was not entitled to recover.

Erskine now showed cause, contending that there was no evidence offered to show that the plaintiff knew the note to have been satisfied; neither was there any circumstance attending it, which might reasonably lead a prudent man to suspect that it had; one or other of which was essentially necessary to disqualify the plaintiff from maintaining his action. For he had paid a valuable consideration for the note to the original payee in whose hands it might properly be supposed to be. And this objection does not lie in the defendant's mouth, whose negligence, in not taking up the bill, when he satisfied Sandal, had left it in the power of the latter to deceive an innocent third person.[21]

[21] Part of the argument is omitted.

Lord KENYON, C. J. I think this matter ought to be further inquired into. It did not strike me at the trial that there was this suspicious circumstance on the face of the note; for, if it appeared to have been noted for nonpayment at the time the plaintiff received it, that ought to have awakened his suspicion, and led him to make further inquiries into the goodness of the note.

ASHHURST, J. I think the rule laid down by my Brother Buller, in the case in Cornwall, is a very safe and proper one: That, where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one; otherwise much mischief might arise.

BULLER, J. There is this distinction between bills indorsed before and after they become due. If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Still stronger ought that suspicion to be when it appears on the face of the note to have been noted for nonpayment, which was the case here. But generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him. Upon this ground it was that, in the case in Cornwall, I held that the defendant, who was the maker, was entitled to set up the same defense that he might have done against the original payee; and the same doctrine has been often ruled at Guildhall. A fair indorsee can never be injured by this rule; for, if the transaction be a fair one, he will still be entitled to recover. But it may be a useful rule to detect fraud whenever that has been practised. [Upon Lord KENYON'S appearing to dissent from the generality of the doctrine held by Mr. Justice BULLER, he proceeded to observe:] My Lord thinks I have gone rather too far in something that I have said, but it is to be observed that I am speaking of cases where the note has been indorsed after it became due, when I consider it as a note newly drawn by the person indorsing it.

Lord KENYON, C. J. I agree with that, with the addition of this circumstance: That it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the indorsee that it have been so. But I should think otherwise if no notice can be fixed on the party; at least I am not prepared to go that length at present.

GROSE, J. If collusion should be proved between the defendant and Sandal, then the former will not be entitled to set up this objection. But at present I am of opinion that a new trial ought to be granted.

Rule absolute.

BAROUGH v. WHITE.

(Court of King's Bench, 1825. 4 Barn. & C. 325.)

Assumpsit by the plaintiff as indorsee of a promissory note made by the defendant for £300. with interest payable to one J. Arnitt, or his order, on demand. At the trial before Abbott, C. J., at the London sittings, after Easter term, the plaintiff proved the handwriting of the drawer and indorser of the note, and also that he had bought and paid for goods for Arnitt to a considerable amount before the note was indorsed, but did not give any direct evidence of the consideration given by him for the note. For the defendant evidence was tendered of declarations made by Arnitt when he was the holder of the note, showing that he gave no value for it to the maker; and the case of Banks v. Colwell, cited in Brown v. Davis, 3 T. R. 80, was relied on. The Lord Chief Justice rejected the evidence, because it could not be shown that the plaintiff when he took the note knew that the payee gave no consideration for it. Arnitt was in court, but was not called as a witness. The plaintiff having obtained a verdict,

Cross, Serjt., now moved for a rule nisi for a new trial.[22]

BAYLEY, J. I am of opinion that the declarations made by Arnitt were not admissible in evidence. The defendant did not identify Arnitt with the plaintiff. Had it been shown that the latter took the note without giving a consideration for it, or after it became due, the case would have been very different. Although there was no direct evidence of the consideration given by the plaintiff to Arnitt, yet dealings between them were proved, whence the existence of a valuable consideration might be fairly presumed. Neither does it appear to me that this note could be considered as overdue. It is said that in Banks v. Colwell, Buller, J., treated a note payable on demand as a note taken by an indorsee after it was due. We are not, however, acquainted with all the circumstances of that case. Payment might have been demanded before the indorsement, and indeed it is stated that several payments had been made on account. In this case no demand was proved, and the note being made payable with interest to Arnitt or order makes it probable that the parties contemplated that the note would be negotiated for some time. For these reasons I think that the evidence was properly rejected, and that the verdict ought not to be disturbed.

[22] The arguments of counsel, and the opinions of Abbott, C. J., and Holroyd and Littledale, JJ., are omitted.

BREWSTER v. McCARDELL.

(Supreme Court of New York, 1832. 8 Wend. 478.)

This was an action of assumpsit, tried at the Albany circuit in February, 1830, before Hon. James Vanderpoel, one of the circuit judges.

The plaintiff was the indorsee of a promissory note given by the defendant to I. Smith & Co. for $200, bearing date 1st May, 1829, and payable 90 days after date. The note was in fact made about the 1st October, 1828, and delivered to the payees, who transferred it to the plaintiff in February, 1829, for money actually loaned. The defendant offered to prove a failure in the consideration of the note, which evidence was objected to, unless it was shown that the note was taken by the plaintiff with a knowledge of such failure, but the objection was overruled, and evidence received in support of the alleged failure. The judge charged the jury that the negotiation of the note, before the day when it bore date, was a strong circumstance of suspicion, sufficient to put the plaintiff upon inquiry, and that he therefore took it subject to any defense which might have been made had the suit been brought by the original payees. He then submitted to the jury the evidence given in support of the defense set up, and the jury found a verdict for the defendant, which the plaintiff moved to set aside.

SUTHERLAND, J. The judge erred in charging the jury that the circumstance of the note having been negotiated to the plaintiff before the day when it bore date was a strong circumstance of suspicion sufficient to put him upon inquiry, and that he therefore took it subject to any defense which might be made as against the original payee.

The note was actually made and delivered to the payee in October, 1828, although it bore date in May, 1829, and was payable 90 days after date. It was transferred to the plaintiff for a valuable consideration in February, 1829, 6 months before it became due. The date of a note is in no respect material, except for the purpose of determining when it was payable. There is no legal objection either to antedating or postdating a note, and I am not prepared to say that either is, in itself, and disconnected from other circumstances, a legal ground of suspicion, so as to put the indorsee upon inquiry, and subject him to all the equities existing between the original parties. Mechanics' & Farmers' Bank v. Schuyler, 7 Cow. 337, note; Chitty on Bills, 77. The Court of King's Bench, in Pasmore v. North, 13 East, 516, held that a note which was postdated, and which was transferred to the plaintiff before the day when it bore date, could not be questioned or impeached by the maker. That case is not distinguishable from this, and I think was rightly decided upon the well-established principles applicable to negotiable paper.

A new trial must therefore be granted, the costs to abide the event.[23]

[23] Accord: Hitchcock v. Edwards, 60 L. T. R. 636 (1889); Royal Bank v. Tottenham, [1894] 2 Q. B. 715 (C. A.).

A negotiable instrument may be antedated; and if an instrument payable

SYLVESTER v. CRAPO.

(Supreme Judicial Court of Massachusetts, Plymouth, 1833. 15 Pick. 92.)

Assumpsit on a promissory note for the sum of $160.64, dated March 14, 1826, payable on demand, with interest, to Isaac Little or his order, and indorsed by him in blank. Plea, the general issue.

At the trial, before Putnam, J., it was proved by the defendant that on February 28, 1827, there was no indorsement on the note, and that it was then held by Little.

The defendant then offered to prove by the confessions of Little to Peter Crapo, a witness, made while the note was held by Little, that the note was obtained by fraud, and was therefore void. The plaintiff objected to this evidence, and it was ruled to be inadmissible.

The defendant was thereupon defaulted. If this evidence was rightly rejected, judgment was to be entered upon the default; otherwise, a new trial was to be granted.[24]

SHAW, C. J. The law is well settled that where an indorsee takes a negotiable security, with actual or constructive notice that it was obtained by fraud, or would be subject to any other legal defense in a suit commenced thereon by the payee, he takes it subject to every such defense in any suit brought in his own name. It has also been long held that, if the security is overdue and dishonored at the time of the indorsement, this circumstance proves such legal constructive notice, and lets in the promisor to any defense which he could make against the promisee.

In this commonwealth it has been determined in a series of cases, and is now the settled rule of practice, that a promissory note payable on demand is payable within a reasonable time, that after the lapse of such reasonable time it is to be deemed overdue and dishonored, and that what is reasonable time is a question of law upon the facts proved. And it has been repeatedly decided that, in a much shorter period than 11 months, such a note will be deemed in law overdue. Field v. Nick-

after date is antedated by mistake, the holder may prove the real date in order to show himself a purchaser before maturity. Drake v. Rogers, 32 Me. 524 (1851); Almich v. Downey, 45 Minn. 460, 48 N. W. 197 (1891). But the maker may not prove a mistake in date against a holder in due course. Huston v. Young, 33 Me. 85 (1851).

An undated instrument, payable after date, matures prima facie at the expiration of the specified period after its delivery. Seldonridge v. Connable, 32 Ind. 375 (1869).

The day of payment of a note may be postponed by agreement of the parties written on the instrument before maturity. If such an agreement is written on the paper after maturity, a purchaser after the original, but before the new, day of payment, who takes without notice of the fact that the extension was granted after maturity, is a holder in due course. Conkling v. Young, 141 Iowa, 676, 120 N. W. 353 (1909); Whitney Bank v. Cannon, 52 La. Ann. 1484, 27 South. 948 (1900).

[24] The arguments of counsel are omitted.

erson, 15 Mass. 131; Thompson v. Hale, 6 Pick. 259; Martin v. Winslow, 2 Mason, 241, Fed. Cas. No. 9,172.

The defendant, then, was entitled to make this defense in this cause, and the question is whether he could avail himself of the admissions of Little, the promisee, made whilst he was the holder, and which would have been competent had the action been brought by the promisee. We think this evidence was admissible, on the principle that they were admissions in relation to the title to property which he then held. Pocock v. Billings, Ryan & Moody, 127, 2 Bing. 269; Barough v. White, 4 Barn. & Cressw. 325, 6 Dowl. & Ryl. 379. This decision on the principal point is entirely reconcilable with that of Barough v. White, and is supported by it, although the evidence was in that case rejected. This proceeded on the ground that in England a promissory note payable on demand is not overdue, or deemed dishonored, by lapse of time, nor till an actual demand made. Such a species of security is probably rare in England, and is regarded as a continuing security until the holder shall see fit to render it due by a demand. Here it has long been in use, and the rules applicable to it have been firmly fixed. The court are therefore of opinion that the admissions made by Little, whilst he was the holder of the note, were admissible evidence.

New trial granted.[25]

HODGE et al. v. WALLACE et al.

(Supreme Court of Wisconsin, 1906. 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938.)

This action was commenced March 14, 1905, to recover the amount due on three promissory notes each bearing date April 15, 1903, for $1,000, payable, respectively, July 15, 1904, July 15, 1905, and July 15, 1906, with interest at 6 per cent. per annum, payable to Robert Burgess & Son or order, and signed by all of the 11 defendants, and on each note there was indorsed as payment under date of April 17, 1903, $200. Omitting the signatures and indorsements the note first reads as follows:

"$1,000.00. Prentice, Wis., April 15, 1903.

"On July 15, 1904, after date for value received, we jointly and severally promise to pay Robert Burgess & Son, or order, one thousand dollars, at Prentice, Wis., with interest at the rate of 6 per cent. per annum from date until paid; interest payable annually. It is stipu-

[25] Accord: Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243 (1908).

As to what is a reasonable time, see McLean v. Bryer, 24 R. I. 599, 54 Atl. 373 (1903); Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522 (1906); Matlock v. Scheurman, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747 (1908).

The doctrine of the principal case does not apply to bank notes and certificates of deposit. Such instruments do not mature until demand. Shute v. Bank, 136 Mass. 487 (1884).

lated and agreed that if any payment or part payment hereon, or any interest shall become due and unpaid, such delinquency shall cause the whole note to immediately become due and collectible. In signing this note I waive notice of protest and extension of time."

The defense was failure of consideration, fraud, and duress. At the close of the trial the court directed a verdict for the defendants, and the plaintiffs appeal.[26]

CASSODAY, C. J. * * * The claim on the part of the plaintiffs, is to the effect that it appears, from the uncontradicted evidence, that the plaintiffs became the owners and holders of each of the three notes in good faith and for value and before maturity and in the usual course of business, and hence, took the same "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves." Sections 1676—22, 1676—25, and 1676—27 of the negotiable instrument law (chapter 356, Laws 1899). On the other hand, it is claimed, on the part of the defendants, that, by virtue of the stipulation contained in each of the three notes, the whole of the principal and interest named therein became due and payable six days prior to the time when the notes were transferred by Robert Burgess & Son to L. J. Hodge & Son and nearly three weeks prior to the time when they were transferred by L. J. Hodge & Son to the plaintiffs. That stipulation is set forth in the foregoing statement and need not be here repeated. Each note required interest to be paid thereon "at the rate of 6 per cent. per annum from date until paid; interest payable annually." The stipulation is to the effect that "if any payment or part payment * * * or any interest" thereon, should "become due and unpaid, such delinquency" should "cause the whole note to immediately become due and collectible."

Counsel on both sides refer to adjudications which they claim to be in support of their respective contentions. The case presented is clearly distinguishable from those where the stipulation for accelerating the maturity of the note or notes on nonpayment of interest or other default, is contained in a mortgage or trust deed given to secure the same, and which mortgage or trust deed and notes are construed in some jurisdictions as one instrument in law. In such a case, the note or notes may be transferred without the transferee having any knowledge of such stipulation in the mortgage or trust deed. Here the stipulation is in the notes themselves, and every transferee of the same necessarily took them with knowledge of such stipulation. So the case presented differs from those where one of a series of notes or an installment of interest has become due and unpaid, with no stipulation, as here, that "such delinquency shall cause the whole note to immediately become due and collectible." Thus it was held by this court, long ago, that: "An indorsee of several notes of the same maker, se-

[26] The statement of facts is abridged, and the arguments and part of the opinion are omitted.

cured by one mortgage bearing the same date, and payable to the order of the same person at different periods, is not chargeable with notice of any equitable defense of the maker against such of the notes as were not due at the time of the indorsement, by reason of the fact that one of the notes was then overdue. Nor is he chargeable with such notice by reason of the fact that the notes bore interest payable annually, and that one year's interest on all of them was due and unpaid at the time of the indorsement." Boss v. Hewitt, 15 Wis. 260. To the same effect: Kelley v. Whitney, 45 Wis. 110, 115–117, 30 Am. Rep. 697; Patterson v. Wright, 64 Wis. 289, 292, 25 N. W. 10.

These cases do not go to the extent of supporting the contention of the plaintiffs. So the case presented is distinguishable from those where the stipulation for accelerating the maturity of the note or notes contained therein is made optional with the payee or mortgagee or his representatives or assigns. Schoonmaker v. Taylor, 14 Wis. 313, 314, 316; Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003. There is nothing in any of the stipulations or notes, here involved, to warrant the suggestion that the payees or transferees of any one of them were thereby given such optional right to declare the whole note due and payable on failure to pay the annual interest which by the express terms of each note became absolutely due and payable April 15, 1904. On the contrary, it is expressly and clearly declared therein that "such delinquency shall cause the whole note to immediately become due and collectible." To construe such language as merely optional or permissive would be to destroy the clearly expressed contract which the parties made for themselves and to force upon them a contract to which neither of them ever gave his consent. The terms of the contract are so clear as to seemingly preclude construction. This may account for the small number of adjudications upon the precise point here presented.

In the absence of such express stipulation, and notwithstanding the rulings in the cases cited, it was held by this court, several years ago, that "one who takes a promissory note, which shows that interest on the principal sum therein named is past due and unpaid, takes it subject to all equities between the original parties." Hart v. Stickney, 41 Wis. 630, 22 Am. Rep. 728. That case followed Newell v. Gregg, 51 Barb. (N. Y.) 263. To the same effect, First Nat. Bank v Forsyth, 67 Minn 257, 69 N. W. 909, 64 Am. St. Rep. 415. Such ruling, however, was out of harmony with the decisions of this court already cited, and goes beyond what is necessary to sustain the contention of the defendants in this case, based on such express stipulation. In a much later case bearing upon that question this court held: "The fact that a note bearing interest payable semi-annually was dated, executed, and delivered on a certain day, fixes the date for the payment of installments of interest at the end of every six months thereafter, and no demand was necessary to create a default." Zautcke v. North Mil. T. Co., 95 Wis. 21, 69 N. W. 978.

It seems to be pretty well settled, that "if the principal of the paper is payable in installments, the paper is considered as dishonored by the failure to pay any one installment when it fell due, whether the entire debt became due on such a failure to pay or not, and a subsequent transferee takes it subject to all the equities." Tiedeman on Com. Paper, § 297; Vinton v. King, 4 Allen (Mass.) 562; Field v. Tibbetts, 57 Me. 358, 99 Am. Dec. 779; 2 Rand. Com. Paper (2d Ed.) § 1047.

But it is said by the same author: "It is doubtful whether the same rule applies to the failure to pay an installment of interest, unless the parties have stipulated that the entire debt shall become due on the failure to pay the interest. Although it has been held that the failure to pay the interest will destroy the negotiability of the paper, with or without this stipulation, the better opinion is that, in the absence of such a stipulation, the failure to pay an installment of interest does not affect the future negotiability of the note or bill." Id.

It was held in Massachusetts more than 100 years ago: "Upon a note payable in 8 years with interest payable annually, an action lies for the interest before the principal is payable." Greenleaf v. Kellogg, 2 Mass. 568. To the same effect: Cooley v. Rose, 3 Mass. 221; Walker v. Kimball, 22 Ill. 537; Morgenstern v. Klees, 30 Ill. 422; Failing v. Clemmer, 49 Iowa, 104; Mills v. Town of Jefferson, 20 Wis. 50.

It is said by Mr. Randolph: "A municipal bond, like a bill or note, may be conditioned on default in the payment of interest, and will, in such case, mature accordingly, although by its terms the principal was not otherwise to become payable for many years. A provision of this sort—e. g. that a note drawing interest annually shall become due on failure to pay the interest—may be contained in a collateral deed of trust or other instrument." 2 Rand, Com. Paper (2d Ed.) § 1048. So it is said by Mr. Daniel: "Where it is provided in the bonds themselves, that if default be made as to any interest coupon, the bonds shall be due and payable, they so become on default of payment of any coupon." 2 Daniel, Neg. Inst. (5th Ed.) § 1506a.

Thus it has been held in Georgia: "Municipal bonds, having on their face many years to run, but issued and put in circulation with an indorsement upon each of them, to the effect that in case default be made in paying any of the interest coupons at maturity, then, as a part of the contract, the bond itself shall become due and payable, are legally due, as to the whole of the principal, whenever a default in paying interest according to any of the coupons occurs. Time is of the essence of the contract." Mayor v. City Bank of Macon, 58 Ga. 584, following, and to the same effect, Sneed v. Wiggins, 3 Ga. 94; Ottawa N. P. R. Co. v. Murray, 15 Ill. 336; Ferris v. Ferris, 28 Barb. (N. Y.) 29. See, also, Lybrand v. Fuller, 30 Tex. Civ. App. 116, 69 S. W. 1005; First Nat. Bank v. Peck, 8 Kan. 660.

But there are adjudications the other way, notably one particularly relied upon by counsel for the plaintiffs. Chicago Ry. E. Co. v. Merchants' Bank, 136 U. S. 268, 284–286, 10 Sup. Ct. 999, 34 L. Ed. 349,

affirming (C. C.) 25 Fed. 809. We must hold that, by the express terms of the stipulation and the default in paying the annual interest which became due and payable April 15, 1904, the whole of each note "immediately became due and collectible." It follows from what has been said that the plaintiffs took the notes after they became due and payable and subject to the equities between the original parties.

2. But we are constrained to hold that it was error to direct a verdict in favor of the defendants. We find no defense established by undisputed evidence. * * * Judgment reversed.[27]

GILL v. CUBIT et al.

(Court of King's Bench, 1824. 3 Barn. & C. 466.)

Declaration by the plaintiff as indorsee of a bill of exchange, bearing date the 19th of August, 1823, drawn by one R. Evered and accepted by the defendants. Plea, general issue. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1824, the plaintiff proved the handwriting of the acceptors, and indorser. The defendant then proved, that on the 20th of August a letter containing the bill in question and two others, was inclosed in a parcel and delivered at the Green Man and Still coach office, and booked for Birmingham. The parcel arrived at Birmingham by the coach, but the letter containing the bills had been opened, and the bills taken out of it. On the following day the drawer advertised the loss of the bills in two newspapers. The plaintiff, who was a bill broker in London, then proved by his nephew, who assisted him in his business, that the bill was brought to his office between the hours of 9 and 10 on the morning of the 21st of August, by a person having a respectable appearance, and whose features were familiar to the witness, but whose name was unknown to him. He desired that the bill might be discounted for him, but the witness at first declined so to do, because the acceptors were not known to him. The person who brought the bill then said that a few days before he had brought other bills to the office, and that if inquiry was made it would be found that the parties whose names were on this bill were highly respectable. He then quitted the office and left the bill, and upon inquiry the witness was satisfied with the names of the acceptors. The stranger returned after a lapse of two hours and indorsed the bill in the name of Charles Taylor, and received the full value for it, the usual discount and a commission of two shillings being deducted. The witness did not inquire the name of the person who brought the bill, or his address, or whether he brought it on his own account or otherwise, or how he came by the bill. It was the practice in the plaintiff's office not to make any inquiries about the

[27] Contra: Gillette v. Hodge, 170 Fed. 313, 95 C. C. A. 205 (1909).

drawer or other parties to a bill, provided the acceptor was good. Upon this evidence the Lord Chief Justice told the jury that there were two questions for their consideration: First, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought that he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant. Then the Lord Chief Justice, after stating the evidence and commenting upon the practice in the plaintiff's office of discounting bills for any persons whose features were known to him, but whose names and abode were unknown, without asking any questions, asked the jury what they would think if a board were affixed over an office with this notice, "Bills discounted for persons whose features are known, and no questions asked." The jury having found a verdict for the defendants, a rule nisi for a new trial was obtained in Easter term last, upon the ground that the plaintiff having paid a valuable consideration for the bill, was entitled to recover its value; and, secondly, that the case had been put too strongly to the jury, when it was compared to the case of a public notice given by a broker that he would discount all bills without asking questions.[28]

BAYLEY, J. I agree that the way in which my Lord Chief Justice put this case for the consideration of the jury, by asking what would be the case if a man were to put over his shop, "Bills discounted for strangers, if they have good names on them, without any questions being asked," was a very strong way of putting the case for their consideration. But I think it was no more than the facts of this case warranted, and that he was putting as a general proposition, that which exactly squared with the particular facts of this case. If a man commonly dealt in that way (and it appeared to be the plaintiff's habit as a broker), it would warrant such an advertisement as that which was described. If in general that was not the plaintiff's course and habit, then in this particular instance he deviated from his general course. In this case a party goes to a shop between 9 and 10 in the morning to get a bill discounted, the clerk does not know his name; he thinks he knows his features; he does not know where he lives; he knows nothing at all about him. The bill is left for two hours, and at the expiration of that time the party comes back again; and the clerk then has the opportunity of asking names, and whether he came on his own account, or from any and what house. No question of that description is put to him. Under these circumstances, I think it was the duty of my Lord Chief Justice to put it to the consideration of the jury whether there was due caution used by that party in that particular instance. If there was not due caution used, the plaintiff has not discounted this bill in the usual and ordinary course of business, or in that

[28] The opinions of Abbott, C. J., and Holroyd, J., are omitted.

way in which business properly and rightly conducted would have required.

But it is said that the question usually submitted for the consideration of the jury in cases of this description, up to the period of time at which my Lord Chief Justice's direction was given, has been whether the bill was taken bona fide, and whether a valuable consideration was given for it. I admit that has been generally the case; but I consider it was parcel of the bona fides whether the plaintiff had asked all those questions which, in the ordinary and proper manner in which trade is conducted, a party ought to ask. I think from the manner in which my Lord Chief Justice presented this case to the consideration of the jury, he put it as being part and parcel of the bona fides; and it has been so put in former cases. In the case of Miller v. Race, 1 Burr. 452, Lord Mansfield says: "Here an innkeeper took the note bona fide in his business from a person who made the appearance of a gentleman. Here is no pretense or suspicion of collusion with the robber. For this matter was strictly inquired and examined into at the trial; and is so stated in the case that he took it for a full and valuable consideration, in the usual course of business. Indeed if there had been any collusion, or any circumstance of unfair dealing, the case had been much otherwise." Now, the question which my Lord Chief Justice has put to the consideration of the jury, whether a party uses due caution or not, is, in other words, putting to them whether he took it in the usual course of business; for the course of business must require, in the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interest of trade. The next case, in order of time, is Grant v. Vaughan. Mr. Justice Wilmott there says: "The note appears to have been taken by him fairly and bona fide in the course of trade, and even with the greatest caution. He made inquiry about it, and then gave the change for it; and there is not the least imputation or pretense of suspicion that he had any notice of its being a lost note." That learned judge did not consider the question of bona fides to be merely whether the note was taken by a party without having any real suspicion in his own mind, but whether he had taken it in the usual course of trade, and with caution. In Peacock v. Rhodes, a shopkeeper at Scarborough took from a perfect stranger a bill of exchange. The latter bought certain goods in the way of the plaintiff's trade. Lord Mansfield says: "The question of mala fides was for the consideration of the jury. The circumstance that the buyers and the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and therefore the case is clear."

Then if in that case those were questions fit for the consideration of a jury, as part and parcel of the question of bona fides, is it not also a fit and proper question for their consideration (when the point to be

decided is whether a man has acted bona fide or not) whether he has inquired with that degree of caution which, in the ordinary course of trade, a prudent trader ought to use. That was the question propounded by my Lord Chief Justice in his direction to the jury; and they have exercised their judgment on it. I think the question was a fit question for their decision, and I think their decision was one with which we are not at liberty to quarrel. On the contrary, it appears to me to be material for the interests of trade, to lay down as a rule that a party cannot in law be considered to act bona fide, or with due caution and due diligence, if he takes a bill of exchange from a person whose features alone he knows, without knowing what his name is, where he lives, or whether he is a person with whom he has been in the habit of trading. If we were to say that in this instance there had been due caution, it would certainly be giving a great facility to the disposal of bills of exchange which have been lost or stolen, by persons who have found or dishonestly obtained them. For these reasons it appears to me that my Lord Chief Justice took the right view of this case; that it was consistent with the doctrine laid down in former cases; and that the decision of the jury was warranted by the evidence. * * *

Rule discharged.

GOODMAN v. SIMONDS.

(Supreme Court of the United States, 1857. 20 How. 343, 15 L. Ed. 934.)

Action by Goodman, the holder, against Simonds, the acceptor, of a bill of exchange which had been placed in the hands of one Sigerson to be negotiated by him for the benefit of Simonds. Sigerson pledged the bill as collateral security for his own debt to the plaintiff. Upon the trial the court instructed the jury that "if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury will find for the defendant."

The plaintiff excepted, and, the jury finding for the defendant, brings error.[29]

CLIFFORD, J. The more important question, whether the instruction was correct, remains to be considered. * * * It was to the effect that, if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defense had been provided for in other prayers for instruction. This

[29] The statement of facts is written by the editors. The arguments of counsel and parts of the opinion are omitted.

one was obviously prepared to raise the single question, whether the plaintiff had acted with due caution in acquiring the bill and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction, is whether the rule of commercial law applied to the case was correct. Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation would be contrary to the soundest principles of public policy.

Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well-defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect.

Such being the settled law in this court, it would seem to follow as a necessary consequence, from the proposition as stated, that if a bill of exchange indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to

recover the amount. The law was thus framed, and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits.

The word "notice," as used by this court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law; and so it was understood by this court in Andrews v. Pond et al., 13 Pet. 65, 10 L. Ed. 61, where it is said that "a person who takes a bill which upon the face of it was dishonored cannot be allowed to claim the privileges which belong to a bona fide holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." And the same doctrine was adopted and enforced in Fowler v. Brantly, 14 Pet. 318, 10 L. Ed. 473, where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, this court held that all those dealing in paper "with such marks on its face must be presumed to have knowledge of what it imported." See Brown v. Davis, 3 Term, 80.

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration; but it is so obvious that they can have no such tendency that we forbear to pursue the subject. Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Wiggin v. Bush, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; Cone v. Baldwin, 12 Pick. (Mass.) 545; Brown v. Tabor, 5 Wend. (N. Y.) 566.

But it is a very different matter when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigen-

cies of such a defense; else the proposition as stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not is a question of fact for the jury, and, like other disputed questions of scienter, must be submitted to their determination, under the instructions of the court; and the proper inquiry is: Did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen.

Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke, in May v. Chapman, 16 Mees. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case, among the more modern decisions in that country, is that of Goodman v. Harvey, 4 Ad. & El. 870. That was a case in bank, on a rule nisi, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of opinion that gross negligence only would not be a sufficient answer, where a party has given consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." That case was followed by Luther v. Rich, 10 Ad. & El. 784, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that he had notice of it, leaving the circumstances by which that notice was to be proved directly or indirectly to be established in evidence; and he further held that an averment that the plaintiff was not a bona fide holder was not equivalent. According to the rule laid down in Goodman v. Harvey, which indubitably is the settled law in all the English courts,

proof that the plaintiff had been guilty of gross negligence in acquiring the bill ought not to defeat his right to recover; and, if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect: both cannot be upheld.

Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any further reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in Goodman v. Harvey is now adopted and sanctioned by the most approved elementary treatises upon commercial law. Raphael v. Bank of England, 33 Eng. L. & Eq. 276; Stephens v. Foster, 1 Cromp., M. & W. 849; Palmer v. Richards, 1 Eng. L. & Eq. 529; Arbouin v. Anderson, 1 Ad. & El. (N. S.) 498; May v. Chapman, 16 Mees. & W. 355; Chitty on Bills (12th Ed.) 257; Story on Bills (3d Ed.) § 416; Byles on Bills (4th Am. Ed.) 121 to 126; Smith's Mer. Law (Ed. 1857) 255; Edwards on Bills, 309; 1 Saund. Plea. & Ev. 591; Wheeler v. Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Backhouse v. Harrison, 5 Barn. & Ad. 1098; Gwynn v. Lee, 9 Gill (Md.) 138.

These cases, beyond controversy, confirm the rule laid down by this court in Swift v. Tyson, and they also furnish the fullest evidence, by their harmony each with the other, as well as by their entire consistency with the principal case, that the law has been uniform since the decision in Goodman v. Harvey, which was decided in 1836; and we think it will appear, upon an examination, that it has always been the same, at least from a very early period in the history of English jurisprudence down to the present time, except for an interval of about 12 years, while the doctrine prevailed which is now invoked in support of the instruction in this case. That doctrine had its origin in Gill v. Cubit, 3 Barn. & Cress. 466, and it was followed by the other cases referred to in the printed argument for defendant. It was decided in 1824, and it is true, as the cases cited abundantly show, that it was acquiesced in for a time as a correct exposition of the commercial law upon the subject under consideration. At the same time, it is proper to remark that there is not wanting respectable authority that it had been much disapproved of before it was directly questioned; and it is certain that, nearly two years before it was finally overruled, Parke, Baron, in delivering judgment in Foster v. Pearson, regarded it as mere "dicta, rather than the decision of the judges of the King's Bench." See Raphael v. Bank of England, per Cresswell.

The reasons assigned for that departure from the long-established

rule upon the subject are as remarkable and unsatisfactory as the change was sudden and radical, and yet their particular examination at this time is unnecessary. It is a sufficient answer to the case to say that it has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority in that court for more than 20 years. The doctrine, says Mr. Chitty in his treatise on Bills, is now completely exploded, and the old rule of law that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess to a person taking them bona fide for value, is again re-established in its fullest extent. It was not, however, accomplished at a single blow; but the error, so to speak, was literally broken up and destroyed by installments. The foundation of the superstructure was severely shaken in Crook v. Jadis, 5 Barn. & Ad. 909, when the full bench first came to the conclusion that want of due care and caution were insufficient to constitute a defense, and that gross negligence, at least, must be shown to defeat a recovery. But it was left to the case of Goodman v. Harvey to announce a complete correction of the error, when Lord Denman declared we have shaken off the last remnant of the contrary doctrine.

A brief reference to some of the earlier cases will be sufficient to show that the decision in Gill v. Cubitt was a departure from the well-known and long-established rule upon the subject under consideration. One of the earliest cases usually referred to is that of Hinton's Case, reported in 2 Show. 247. It was an action of the case against the drawer upon a bill of exchange payable to bearer. The court ruled that the holder must entitle himself to it on a consideration; "for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." And so in Anonymous, 1 Salk. 126, where a bank note payable to A., or bearer, was lost, and found by a stranger, and by him transferred to C. for value, Holt, C. J., held that "A. might have trover against the stranger, for he had no title to it, but not against C., by reason of the course of trade, which creates a property in the bearer." And again in Miller v. Race, 1 Burr. 462, where an innkeeper received a bank note from his lodger in the course of business, and paid the balance, Lord Mansfield held he might retain it, as he came by it fairly and bona fide, and for value, and without knowledge that it had been stolen. And on a second occasion, in Grant v. Vaughan, 3 Burr. 1516, where a bill payable to bearer was lost, and the finder passed it to the plaintiff, the same court left it to the jury to find whether he came to the possession fairly and bona fide. But a still stronger case is that of Peacock v. Rhodes, 2 Doug. 633, where a bill of exchange, indorsed in blank, was stolen and passed to the plaintiff by a man not known. It was argued for the defendant that a holder should not in prudence take a bill unless he knew the person. Lord Mansfield answered "that the law is well settled that a holder coming fairly by a bill has nothing to do with the transac-

tion between the original parties. * * * The question of mala fides was for the consideration of the jury." And lastly, and to the same effect, is Lawson v. Weston et al., 4 Esp. R. 56, where a bill of exchange for £500. was lost or stolen, and was discounted by plaintiff for a stranger. It was insisted for the defendant that "a banker or any other person should not discount a bill for one unknown, without using diligence to inquire into the circumstances." Lord Kenyon replied that "to adopt the principles of the defense would be to paralyze the circulation of all the paper in the country, and with it all its commerce; that the circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiff."

The cases cited, commencing in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when Gill v. Cubit was decided, especially as the judges of the King's Bench, in giving their opinions on that occasion, did not pretend that there were any later decisions in which it had been modified. * * *

Judgment reversed.[30]

WEST ST. LOUIS SAVINGS BANK v. SHAWNEE COUNTY BANK.

(Supreme Court of the United States, 1877. 95 U. S. 557, 24 L. Ed. 490.)

Appeal from the Circuit Court of the United States for the District of Kansas.

Parmelee, cashier of the Shawnee County Bank, made his individual note for $3,000, payable to the order of the West St. Louis Savings Bank, indorsed it "G. F. Parmelee, Cashier," and gave as collateral security a certificate of stock in the Shawnee County Bank, issued to and owned by him. The consideration of the note was money lent to him by the payee, who was advised that he intended to use it to pay for his stock in the Shawnee County Bank. He failed to pay the note; whereupon this suit was commenced by the payee against him as maker, and the Shawnee County Bank as indorser, of the note.

The court passed a decree against Parmelee, but dismissed the bill so far as it asked relief against the Shawnee County Bank.

The complainant then brought the case here.

The remaining facts in the case are stated in the opinion of the court.

WAITE, C. J. The testimony in this case satisfies us beyond all doubt that the liability of the Shawnee County Bank, if any liability exists, is that of an accommodation indorser or surety for Parmelee, its cashier, and that this was known to the St. Louis Bank when it

[30] Accord: Unaka Bank v. Butler, 113 Tenn. 574, 83 S. W. 655 (1904); Hutchins v. Langley, 27 App. D. C. 234 (1906); Ketcham v. Govin, 35 Misc. Rep. 375, 71 N. Y. Supp. 991 (1901).

made the discount. The note itself bears upon its face the most unmistakable evidence of this fact. It is made payable directly to the St. Louis Bank, and the Shawnee Bank appears only as an indorser in blank of a promissory note before indorsement by the payee and while the note is in the hands of the maker. Such an indorsement by a bank is, to say the least, unusual, and sufficient to put a discounting bank upon inquiry as to the authority for making it.

But we are not left in this case to inquiry or presumption. Both the correspondence and the testimony of the cashier of the St. Louis Bank show conclusively that this was the understanding of the parties. Parmelee, in transmitting the note for discount, wrote for himself, and not as cashier. He spoke of his own note, and authorized a draft upon himself personally for the interest. He pledged his own stock for the payment of the note. Wernse, the St. Louis cashier, says the negotiations opened with an application by Parmelee for a loan to enable him to pay for his stock in the Shawnee Bank, upon the pledge of the stock as collateral. There is not a single circumstance tending in any manner to prove that the transaction was looked upon as a rediscount for the Shawnee Bank, except the entries in the books of the St. Louis Bank, and these are far from sufficient to overcome the positive testimony as to what the agreement actually was.

This being the case, the question is directly presented as to the liability of the Shawnee County Bank upon such an indorsement. It is certain from the testimony that no indorsement of the kind was ever expressly authorized by the bank. None of the officers, except Parmelee, and Hayward, the vice president, ever knew that it had been made until long after the last discount had been obtained. The books of the Shawnee Bank contained no evidence of such a transaction, and the accounts of the St. Louis Bank, as rendered, gave no indication of the actual character of the paper discounted.

Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking. Thus he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a bona fide rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the

notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss.

Decree affirmed.

ECKERT v. CAMERON et al.

(Supreme Court of Pennsylvania, 1862. 43 Pa. 120.)

This was an action by Cameron and others, doing business as the Lebanon Deposit Bank, against Eckert, as indorser of four promissory notes, all of which were, with their indorsements, identical, except as to dates and amounts, with the following:

"$2,000. Genesee Mills, Lebanon, April 9, 1860.

"Three months after date we promise to pay to the order of ourselves, at the Western Bank of Philadelphia, two thousand dollars, value received, without defalcation.

"No. Myers & Shour."

Indorsed: "Myers & Shour."
"Daniel Myers."
"William Eckert."
"Myers & Shour."

In this condition the notes on the day of their date were discounted by the plaintiffs' bank for Myers & Shour, and the proceeds paid to Shour. Upon the trial the court admitted, over the defendant Eckert's objection, incompetent evidence tending to prove that he indorsed the notes for the accommodation of Myers & Shour and instructed the jury as follows:

"This suit is brought against William Eckert, as indorsee of these promissory notes, drawn by Myers & Shour, payable to their own order at the Western Bank of Philadelphia, indorsed by Myers & Shour, which rendered the paper negotiable, then indorsed by Daniel Myers and William Eckert, the defendant, and again by Myers & Shour. The plaintiffs, private bankers, claim to have discounted the notes in the usual course of business. Taking these notes as exhibited in court, without any explanation, the indorsers are discharged. They seem to have been drawn by Myers & Shour, indorsed by them, then by D. Myers and defendant, and afterwards by Myers & Shour, who, both as drawers and first indorsers, were liable to make payment; and, as their names appear on the paper after the other indorsers, it will be presumed that they lifted the notes on account of their liability, and put them again into circulation, as it will not be presumed that they paid them before due. Coming back again into the hands of those originally liable, they are in law extinguished, and there can be no recovery against the indorsers. Their obligation is discharged. How is

it as explained by the parol evidence? Dehuff, a clerk in the bank, testifies that, shortly before these notes were discounted, Myers & Shour wrote to them, asking if they could obtain the money required on such paper, with D. Myers and William Eckert as indorsers. An answer was sent, and the next day in each case the note thus prepared and indorsed was presented to, and discounted by, the bank. Each was presented by Shour on the days they respectively bear dates, and were then, in presence of the witness, indorsed by Myers & Shour, to show that they received the money. If you believe from this evidence, and other to which we will refer, that D. Myers and Eckert were accommodation indorsers, the notes brought by Shour to the bank thus indorsed on the day of their respective dates, and then discounted by the bank, the mere reindorsement by Myers & Shour, for the purpose stated by the witness, will not destroy the negotiable character of the notes or binding effect of the indorsements, provided they never had been in circulation, and in that event there is nothing in the way of the plaintiffs' recovery. He who agrees to indorse paper for the accommodation of another agrees that the holder shall use it in the way that will best accommodate himself."

There was a verdict and judgment for the plaintiffs, and the defendant sued out this writ of error, assigning the admission of the incompetent evidence and the instructions.[81]

STRONG, J. (after holding the admission of the evidence above referred to error). * * * But was it necessary for the plaintiffs to prove, by affirmative evidence, that the defendant was an accommodation indorser? They had discounted the notes for the makers, on the day of their date, before their maturity, and with the defendant's indorsements upon them. Under such circumstances were the indorsements not binding, unless it was proved that the notes had never before been negotiated, but were indorsed for the convenience of the drawers? A bill or note which has been once in circulation, overdue, and coming from the hands of the acceptor or maker, is presumed to be extinguished. Byles on Bills, 180; McGee v. Prouty, 9 Metc. 547, 43 Am. Dec. 409. This is because it was the duty of the maker or acceptor to take it up when it fell due, and therefore it is fairly inferable, from his possession of it after that time, that it has fulfilled its office. But before it has fallen due the maker of a promissory note is under no obligation to take it up, and the reason fails for presuming its extinguishment from his then having it in his possession. And with the failure of the reason it is fair to conclude that the rule also ceases. When, as in this case, the maker offers for discount an indorsed note, on the day of its date, and before its maturity, the law does not infer, from the indorsement and from the possession of the maker, that the note has been either paid or extinguished. It may be doubted whether the condition of such a note proves that it has ever been in circulation;

[81] The statement of the case is abridged, and part of the opinion omitted.

whether, indeed, it is not rather a just inference that the indorsement was made for the accommodation of the maker, and the note left with him to raise money upon it. In Burbridge v. Manners, 3 Campb. 193, Lord Ellenborough said: "Payment means payment in due course, and not by anticipation." "I agree," said he, "that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent endorsee. A payment before it becomes due, however, I think does not extinguish it any more than if it were merely discounted."

Now, possession by a maker after an indorsement certainly cannot amount to more than proof of payment. Burbridge v. Manners was a suit against the indorser of a promissory note which had been paid four days before it became due, but not canceled, and which afterwards came into the hands of the plaintiff before its maturity. The plaintiff was permitted to recover. And in Morley v. Culverwell, 7 Meeson & Welsby, 174, it appeared that a bill of exchange which had been accepted was satisfied four days before it fell due by the acceptor, and delivered up to him by the drawer uncanceled. It was held, notwithstanding this, that the drawer was liable on it to a party to whom the acceptor afterwards indorsed it for value before it became due. This was the unanimous opinion of the Court of Exchequer, and the language of the Barons completely vindicates their judgment. Lord Abinger, Chief Baron, said: "The contract of the drawer and of each indorser is that the bill shall be paid by the acceptor at its maturity, not before it is due; that it shall be paid according to its tenor and effect—that is, when it becomes due. If, upon its being discharged before it becomes due, the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it against his intention. It is in the hands of an innocent holder who has no notice that it has been discharged Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them, the parties may circulate them so as to give a title to a bona fide holder before they become due; and wherein does this case differ from that? Therefore a bill is not properly paid and satisfied, according to its tenor, unless it be paid when due; and consequently, if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent holder for value from recovering upon it." In the same case Baron Parke said: "Nothing will discharge the acceptor or the drawer except payment according to the law merchant; that is, payment of the bill at maturity. If a party pays it before, he purchases it, and is in the same situation as if he had discounted it."

These cases hold there is nothing in the fact that an acceptor or maker of an indorsed note has it in possession, and offers it for discount before its maturity, to give notice to a purchaser of its payment or extinguishment. Their doctrine is that one who discounts such a

note for the maker before it is due, according to its tenor, is an innocent holder for value, and is entitled to recover against any of the parties to it. They cover the present case, and they appear to be supported by sound reason. It follows that the plaintiff in error could not have been hurt by the admission of the contents of Shour's letter.

There is nothing else in the record of which he has any reason to complain.

The judgment is affirmed.

NATIONAL PARK BANK v. GERMAN-AMERICAN MUT. WAREHOUSING & SECURITY CO.

(Court of Appeals of New York, 1889. 116 N. Y. 281, 22 N. E. 567, 5 L. R.. A. 673.)

Appeal from a judgment of the general term of the Superior Court of the City of New York, entered upon an order made June 8, 1886, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought upon certain promissory notes made by the firm of Squires, Taylor & Co., made payable to the order of the makers, and alleged to have been indorsed by defendant, the German-American Warehousing & Security Company. The notes were indorsed by Squires, Taylor & Co., the makers and payees, and thereupon the president of the defendant indorsed them as second indorser in the name of the defendant. The notes were then discounted by the plaintiff for Squires, Taylor & Co., and the avails credited to them.[32]

FOLLETT, Ch. J. The statute by which the defendant was incorporated provides that, in addition to the powers therein enumerated, it shall possess all the powers and privileges of corporations organized under the manufacturing act (chapter 40, Laws 1848), and the acts extending and amending the same, except wherein such acts are inconsistent with the provisions of the incorporating statute. The litigants agree that the defendant's board of directors had power to authorize its president to make and indorse promissory notes for the purpose of transacting the business it was authorized to engage in, and that such power was conferred by the board on its president. The powers of corporations are those enumerated in the statutes under which they are incorporated, in general statutes, in the articles of association, and like instruments, executed in pursuance of the statutes (denominated by Mr. Brice "constating instruments"—Ultra Vires [2d Am. Ed.] 27), and also such powers as flow from or are incidental and necessary to the exercise of the enumerated powers (1 Rev. St. p. 599, §§ 1–3)

[32] The statement of facts is abridged, and the arguments of counsel are omitted.

Counsel have not directed our attention to, nor have we found in any of the statutes referred to, a provision empowering the defendant to bind itself by making or indorsing promissory notes for the accommodation of the makers for a consideration paid. It is well settled that such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing and like business corporations. Central Bank v. Empire Stone Dressing Co., 26 Barb. 23; Bridgeport City Bank v. Same, 30 Barb. 421; Farmers' & Mechanics' Bank v. Same, 5 Bosw. 275; Morford v. Farmers' Bank of Saratoga, Fed. Cas. No. 4,534, 26 Barb. 568; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Ætna National Bank v. Charter Oak Life Ins. Co., 50 Conn. 167; Monument National Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Davis v. Old Colony R. R. Co., 131 Mass. 258; Culver v. Reno Real-Estate Co., 91 Pa. 367; Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75.

The defendant having the general power to bind itself by promissory notes and contracts of indorsement, the plaintiff is entitled to recover if it is a holder of the notes for value and without notice that they were indorsed for the accommodation of the makers, and not in the usual course of business. The referee finds that in consideration of one-fourth of 1 per cent. per month for every month of the time on which the notes were given, the defendant indorsed for Squires, Taylor & Co., between November 10, 1876, and August 27, 1878, the date of the first note in suit, 19 notes precisely like the 4 in suit, except dates and amounts, aggregating $170,000, which were discounted by the plaintiff for, and the avails placed to the credit of, Squires, Taylor & Co. The referee also finds that defendant's president was never authorized by its board of directors to indorse commercial paper for the accommodation of makers, or to indorse such paper for a consideration paid by the makers, and that none of them knew that such indorsements had been made until this action was brought.

The fact that the maker of a promissory note procures it to be discounted for his own benefit is, if unexplained, notice to the discounter that the indorsement is not in the usual course of business, but it is for the accommodation of the maker. Stall v. Catskill Bank, 18 Wend. 466; Fielden v. Lahens, 9 Bosw. 436, 3 Trans. App. 218; Fielden v. Lahens, 2 Abb. Dec. 111, 6 Abb. Pr. (N. S.) 341; 1 Ames' Cas. on Bills and Notes, 738; Bank of Vergennes v. Cameron, 7 Barb. 143; Hendrie v. Berkowitz, 37 Cal. 113, 99 Am. Dec. 251; Lemoine v. Bank, 3 Dill. 44, Fed. Cas. No. 8,240; Bloom v. Helm, 53 Miss. 21; Daniel, Neg. Inst. (2d Ed.) p. 297, § 365; Edw. Bills (3d Ed.) p. 98, § 105.

Ex parte Estabrook, 2 Low. 547, Fed. Cas. No. 4,534, is opposed to these authorities, but this case is in conflict with the decisions in this state, and we believe it to be without the support of any well-considered case. The indorsements having been made for the accommoda-

tion of the makers, and the plaintiff having discounted the notes with notice of that fact, cannot recover. The judgment should be reversed and a new trial granted, with costs to abide the event.[33]

ROCHESTER & C. TURNPIKE ROAD CO. v. PAVIOUR.

(Court of Appeals of New York, 1900. 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790.)

Appeal from a judgment of the Supreme Court, entered April 8, 1898, upon an order of the Appellate Division in the Fourth Judicial Department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for the plaintiff upon a verdict directed by the court.

Mrs. Warren, an insurance agent, delivered certain policies of insurance covering premises in New Mexico to the defendant, directing him to collect the premiums due upon the same from the insured. The defendant delivered the polices to one Briggs for the insured, Briggs agreeing to pay the premiums. The premiums were not paid at the time either set of policies was delivered; but, after payment had been demanded several times by the defendant, Briggs gave him a check on account, dated June 17, 1896, drawn upon the Central Bank of Rochester, payable to the order of the defendant, for $150, signed, "Rochester & Charlotte Turnpike Road Co. M. H. Briggs, Treas." On the 24th of July following, Briggs gave the defendant a check, similar in all respects, except that it was for the sum of $300, and subsequently he paid the balance of the premiums from his own funds. The defendant deposited these checks in the Traders' Bank of Rochester, where he did his banking business, procured drafts for the amount owing to Mrs. Warren, and sent them to her. The checks were paid upon presentation in the ordinary course of business from moneys belonging to the plaintiff on deposit in the Central Bank.

This action was brought to recover the amount paid by means of these checks as money of the plaintiff received by the defendant to its use. The plaintiff had no interest in the policies and no business relations with the defendant, and was indebted neither to him nor to Briggs, who used the checks without authority and thus embezzled the money drawn thereby. At the close of the evidence the court directed a verdict for the plaintiff, but ordered the defendant's exceptions to be heard in the first instance by the Appellate Division, which, after hearing the parties, overruled the exceptions and directed judgment upon the verdict in favor of the plaintiff. From said order, as

[33] Accord: Cook v. American Tubing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193 (1905).

well as from the judgment entered accordingly, the defendant brings this appeal.[84]

VANN, J. By delivering the policies to Briggs without collecting the premiums at the time, the defendant apparently gave credit for the same and thus made the debt his own. At all events, he subsequently treated it as a debt owing by Briggs to himself, the same as he had similar claims under like circumstances in previous years. Briggs had no authority, either actual or apparent, to give the checks of the plaintiff in payment of his own debt or that of a third person. If the defendant knew or believed, or had good reason to believe, that, in giving the checks, Briggs was appropriating the money of the plaintiff to the payment of his own debt, or one that he treated as his own, he had no right to accept them without inquiry. While he was not bound to be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. Second National Bank v. Weston, 161 N. Y. 520, 526, 55 N. E. 1080, 76 Am. St. Rep. 283; Cheever v. Pittsburgh, etc., R. R. Co., 150 N. Y 59, 66, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646. Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend.

The checks themselves gave notice of a suspicious fact and invited inquiry in relation thereto. They showed upon their face that Briggs was apparently using the money of the plaintiff for his own purposes, since they were not his checks, but the checks of a corporation issued by him as its treasurer. In the absence of express authority, or of that which may be implied from past conduct known to the corporation, he could not lawfully use the checks, which stood as its money, for such a purpose, as the defendant is presumed to have known. There was no express authority and nothing to indicate that Briggs was impliedly authorized to thus use the money of the plaintiff, and the presumption was the other way. The plaintiff, as its name indicated, was not a trading corporation, but a local plank road company, with no authority to own buildings situated out of the state. It would be extraordinary for a concern which merely operated a short plank road in this state to have any interest in buildings in New Mexico, or to be indebted for premiums upon policies issued thereon, and the admitted facts compel us to assume that the defendant so regarded it. Moreover, the policies themselves, as the defendant knew, were not issued in the name of the plaintiff as the owner of the buildings, and there was no connection, apparent or otherwise, between it and the policies. Without inquiry he accepted checks drawn by Briggs as treasurer of the plaintiff in payment of a debt which he had no reason to believe was

[84] The statement of facts is abridged.

for it to pay, and which he had strong reason to believe had become the debt of Briggs himself. He called for no explanation from him, made no inquiry at the office of the plaintiff, or of any one representing it, which would naturally have disclosed the fraud, but accepted the checks without question, drew the money, and thereby ran the risk of being called upon to restore it.

The facts known to the defendant should have aroused his suspicion and led him, as an honest man, to make some investigation before he accepted the money of a corporation, which owed him nothing, in payment of a claim that he held against some one else. If he had such confidence in Briggs that he was willing to trust him without inquiry, under suspicious circumstances of a substantial character, he must stand the loss, for he failed to discharge a duty required by commercial integrity. He could not confide in Briggs at the expense of the plaintiff, after notice of his irregular and doubtful conduct. Among the heaviest losses in business are those which result from a blind trust in men on account of their standing in the community, without making the investigation required by common prudence. There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicion which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint. 2 Randolph, Com. Paper (2d Ed.) § 999; 1 Daniel, Negotiable Instruments (4th Ed.) § 775; 1 Edwards, Bills & Notes (3d Ed.) §§ 517, 520; 1 Parsons, Notes & Bills, 259; Story on Promissory Notes (6th Ed.) § 197; Chitty on Bills (8th Ed.) 281.

As the rules of law governing the case are now well settled, we shall refer to but few authorities, and those of recent date in this court. In Wilson v. Metropolitan El. Ry. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625, it was stated, as a general rule, "that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. Prima facie the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation." It was also held in that case that the purchaser of a promissory note, purporting to have been issued by a corporation, who made the purchase under circumstances which devolved upon him the duty of inquiry as to its validity, assumed the risk, by failing to inquire, of proving that the facts he

could have discovered, had he made inquiry, would have protected him.

In Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, an agent, who had charge of certain premises known as the "Glass Buildings," deposited the rents collected by him to the credit of a bank account kept in his name as "Agent, Glass Buildings." Without authority he gave a check on this account, signed by him as "Agent, Glass Buildings," in payment of his own debt. The check was paid, and, upon the trial of an action brought five years afterwards to recover the amount thereof, there was no evidence of bad faith on the part of the defendant who took the check, except that afforded by the check itself and the nature of the debt. The court held that the form of the check was sufficient to indicate to the defendant the existence of an agency and to put him on inquiry as to the agent's authority to so use the money. In deciding the case, the court said: "We think that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund. The buildings and the bank were both well known, were in the same city and very near to the place where the check was received by the defendant, and had an inquiry been made at the bank or at the buildings it would have been ascertained that the account was held by William Boswell, not as owner, but as agent for these plaintiffs. In case a person, having notice that money or property is held by another in a fiduciary capacity, receives it without inquiry from the agent in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner, unless the agent was authorized to so dispose of it."

In Cheever v. Pittsburgh R. R. Co., 150 N. Y. 59, 67, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, the paper was regular on its face, and this fact protected the plaintiff; but the court, referring to "a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit," said: "When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it"—citing the Wilson and Gerard Cases, supra, and also Hanover Bank v. American Dock & T. Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Bank of New York, etc., v. American Dock & T. Co., 143 N. Y. 559, 38 N. E. 713. In the case at bar the appearances were not deceptive, but suggested the true state of affairs, which worked a fraud on the plaintiff. See, also, First Nat. Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; Smith v. Weston, 159 N. Y. 194, 199, 54 N. E. 38; Angle v. North Western, etc., Ins. Co., 92 U. S. 330, 342, 23 L. Ed. 556.

The case of Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979, affirmed without opinion in 155 N. Y. 637, 49 N. E. 1096, which is relied upon by the defendant, does not conflict with the views herein ex-

pressed. According to the facts found in that case, a new firm had succeeded an old firm, composed in part of the same members, and with a similar, but not identical, firm name. The business of the new firm "was apparently the same as and a continuation of that" of the old, "and such appearance was a natural result of the conduct and acquiescence of the other members of the new firm, from the formation and during the entire continuance thereof." "In fact, the business and assets of the old firm were so mingled with those of the new firm as to establish a practical identity between the two firms." The new firm gave certified checks to be applied upon an indebtedness of the old, which the former had not assumed. Said checks were received "in absolute good faith" and collateral securities were surrendered in consequence thereof. Under these peculiar circumstances it was decided that the receiver of the new firm, which had become insolvent, could not recover the money back. Owing to the intimate connection, if not substantial identity, of the two firms, the Supreme Court held that there was nothing suspicious or unusual in paying a debt of the old firm with a check of the new concern, nor any notice that in so doing the funds of the new partnership were being improperly used. It was natural to assume, under the circumstances, that the new firm had bought out the old, and being indebted to it for the purchase price, had paid a part of the debt in this way through the direction of a member common to both, "to whom," as the trial judge found, "the other three partners confided the unrestricted, absolute, and entire control and management of the business, allowing him to conduct it as though it were his own, and in its behalf to incur liabilities and dispose of assets absolutely according to his own judgment." Thus it is obvious that the managing copartner had implied authority from his associates to use the checks as he did, and that the question of notice was not necessarily involved in the decision.[35]

In the case now before us the question of notice is supreme. The checks, when read in the light of the facts known to the defendant, were notice to him that he was apparently accepting money from one to whom it did not belong, and this cast upon him the duty of inquiring into the matter so as to see whether the facts were in accord with the appearances; for, if they were, he knew that he could not honestly take the checks.

The judgment appealed from should be affirmed, with costs.[36]

[35] Compare Ward v. Trust Co., 117 App. Div. 130, 102 N. Y. Supp. 50 (1907).

[36] Compare Borough of Montvale v. Bank, 74 N. J. Law, 464, 67 Atl. 67 (1907), where the bank, to which the mayor of the borough tortiously pledged for his own debt authorized but unissued city bonds payable to bearer, was held a holder in due course.

"Where a person takes from another, for that other's personal liability or on account thereof, the obligation upon commercial paper of a corporation in which such other is an officer of a character not ordinarily intrusted with the duty of making such obligations, the instrument being his handiwork, and such person knows his connection with the corporation, such person is put upon inquiry as to the real character of the paper and the authority of such

HIAWATHA IRON CO. v. JOHN STRANGE PAPER CO.

(Supreme Court of Wisconsin, 1900. 106 Wis. 111, 81 N. W. 1034.)

This is an action upon two promissory notes against John Strange, as maker, and the John Strange Paper Company, a corporation, as indorser. The corporation defended on the ground that the payee indorsement of the corporation name upon said notes was made by John Strange in fraud of the corporation, and that the plaintiff was not a bona fide purchaser, but took the same with notice of the fraud. Judgment for the plaintiff, and the defendant appeals.[37]

WINSLOW, J. The notes in question were executed by Strange in payment of his individual debt to Smith, and it is admitted that the indorsement of the corporation was an accommodation indorsement, and was placed thereon by Strange, as president, without authority and without consideration, and consequently that the corporation was not bound by such indorsement to the original holder of the notes, or any subsequent indorsee who took them with notice of the fact. They were transferred to the plaintiff, for what must be considered an adequate consideration, before maturity, and with no actual knowledge of the infirmity in them, by a business man in good repute, who had possession and apparent ownership of them; and the only question in the case is whether the plaintiff was charged with notice of fraud upon the corporation by the circumstances under which it purchased the notes, or by anything appearing upon the face of the instruments themselves.

The appellant was a trading corporation, and it had undoubted power to receive commercial paper for debts owing to it, created in the course of its business. Rockwell v. Elkhorn Bank, 13 Wis. 653. From this it necessarily follows that it had also power to dispose of such paper by indorsement or assignment as may suit its purpose. 1 Daniel, Neg. Inst. §§ 384, 385. When a corporation possesses this general power to become a party to commercial paper, such paper will be presumed to have been executed in the legitimate course of its business, and will be valid in the hands of a bona fide purchaser for value, whether executed in the usual course of business or not. 1 Daniel, Neg. Inst. § 386. An indorsement in blank is valid according to the law merchant, and does not affect a subsequent holder with notice of infirmities, or put him upon inquiry. Lyon v. Ewings, 17 Wis. 61. A corporation must necessarily act through an officer or agent in making an indorsement, and the indorsement will ordinarily be valid in the hands of a bona fide holder before maturity, if made by an officer or agent having actual authority to indorse commercial paper on behalf

other to use the name of the corporation in the transaction." Per Marshall, J., in Pelton v. Spider Lake Co., 132 Wis. 219, 236 (1907).

But see Orr v. South Amboy Co., 47 Misc. Rep. 604, 94 N. Y. Supp. 524 (1905), where the rule was applied to a director.

[37] The statement of the case is abridged, and the arguments of counsel are omitted.

of the corporation, or by an officer or agent who is apparently clothed with such authority by the corporation, even though the indorsement be an accommodation indorsement, and a fraud on the corporation. Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

In the present case, John Strange, who indorsed the notes on behalf of the corporation, not only had for years transacted the corporation's financial business of this character, and thus been clothed with apparent authority to indorse commercial paper, but he had also express authority, by the articles of incorporation, "to have general charge, control, and management of the affairs of the corporation, and to sign all contracts and conveyances." This is a very broad and sweeping grant of authority, and must be held to include the indorsement of commercial paper; and it was an authority publicly proclaimed to the world, and which all dealing with the corporation were entitled to rely upon implicitly. Now, had the notes in suit in this case been the notes of some third person running to the corporation, and indorsed, as these notes were, in the corporate name, and by the proper officer, there can be no doubt that the corporation would be bound by such indorsement the moment such notes came into the hands of a bona fide purchaser for value before due, although in fact it never owned the notes, and the indorsement was a fraud upon it. Upon their face, such notes would appear to have been notes taken by the corporation in the transaction of its business, and, being indorsed in the corporate name by the officer both apparently and actually authorized to indorse commercial paper for the corporation, a purchaser in good faith before maturity would not be bound to inquire whether the corporation owned it when it was indorsed or not, but would be entitled to assume that the relations of all the parties to the paper were precisely what they appeared to be upon its face. Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107; Hoge v. Lansing, 35 N. Y. 136; U. S. Nat. Bank of New York v. First Nat. Bank of Little Rock, 13 C. C. A. 472, 64 Fed. 985; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank of Detroit, 97 Fed. 181, 38 C. C. A. 108.

But it is claimed that the fact that the notes on their face showed that they were given by the president of the corporation to the corporation itself was a fact which required a purchaser to inquire into the real nature of the transaction before purchasing them. Had the parties to the paper been reversed, and the notes been the notes of the corporation, executed by Strange, and payable to Strange individually, a purchaser would doubtless have been put upon inquiry, because the notes would then have shown on their face that an officer of the corporation had dealt directly with himself, and adversely to the interests of the corporation. Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184; Third Nat. Bank v. Marine Lumber Co., 44 Minn. 65, 46 N. W. 145; Stough v. Ponca Mill Co., 54 Neb. 500, 74 N. W. 868; Lee v. Smith, 84 Mo. 304, 54 Am. Rep. 101. And, again, had Strange given his note to a third person, and before delivery placed the corpo-

rate indorsement upon it, it might well be that a purchaser of such paper would be charged with notice of the fact that the corporate indorsement was for accommodation only, and not in the course of business, and hence that he must inquire into the question of actual authority. West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557, 24 L. Ed. 490. But we have no such case here. The notes upon their face import simply that Strange was indebted to the corporation, and executed his notes to secure that indebtedness. This occurs frequently, and there is nothing either in the laws of business or good morals which prevents or disapproves of such a transaction. A corporation may deal with its officers, and take their notes for indebtedness resulting from such dealings. So far as appears on the face of the paper, the directors of the corporation may have required Strange to execute the notes. There is nothing on the face of the notes to indicate anything more than an ordinary business transaction.

We conclude that the undisputed evidence shows that the plaintiff was a bona fide holder of the notes for value, before maturity, and in the regular course of business. This conclusion renders unnecessary any discussion of exceptions reserved to portions of the charge, as well as the errors claimed because of the refusal to nonsuit the plaintiff and the refusal to grant a new trial.

A verdict for the plaintiff should have been directed. Judgment affirmed.[38]

FILLEBROWN et al. v. HAYWARD et al.

(Supreme Judicial Court of Massachusetts, 1906. 190 Mass. 472, 77 N. E. 45.)

Bill in equity, inserted in a writ of the superior court dated May 4, 1904, by the trustees in bankruptcy of the Cable Rubber Company, a corporation organized under the laws of this commonwealth, against Kezia W. Hayward of Ponkapog, the former treasurer of the Cable Rubber Company, formerly holding and controlling a majority of the capital stock of that company, and William J. Cable, of Boston, praying for an order to compel the defendant Hayward to pay to the plaintiffs certain sums of money alleged to have been taken by the defendant Cable from the Cable Rubber Company and paid to her.

In the superior court the case was heard by Sheldon, J., who made a decree that the plaintiffs were not entitled to recover from the defendant Hayward on any of the grounds alleged in their bill. The plaintiffs appealed.

The defendant Hayward, who owned a majority of the stock of the bankrupt corporation and was its treasurer, in September, 1899, sold all her stock to Wm. J. Cable for $50,000. Cable paid $35,000 in cash, and

[38] Compare Wait v. Thayer, 118 Mass. 473 (1875); In re Troy Co. (D. C.) 136 Fed. 420 (1905), same principle.

for the balance gave 60 notes, each for $333.33, payable at intervals of one month, beginning January, 1900. Thereafter Cable acted as president, treasurer and general manager of the company, and had full charge of its affairs with the acquiescence of the directors, at a salary of $5,000 per year. Beginning in January, 1900, each month, Cable caused the check of the company for $333.33 to be drawn payable to himself individually, signed it as treasurer, indorsed it individually to the defendant, and delivered it to her in payment of his note to her maturing that month. The checks were collected and the defendant received the proceeds.

The total amounts so drawn by Cable and paid to her and his other creditors and to himself were properly charged to him on the books of the corporation. They exceeded each year and each month the amounts respectively accruing to him from the corporation. These accounts were openly kept, were never in any way concealed from any one interested in the corporation, and Mrs. Hayward received the checks so sent to her in good faith, without noticing their form and without any actual knowledge that he obtained the sums so sent her from the corporation. The amounts of all these checks were charged to Cable on the books of the corporation as aforesaid. This action is brought to recover from the defendant the proceeds of these checks.[39]

BRALEY, J. * * * After the period of service had expired to which reference already has been made, the defendant having resigned her offices as treasurer and director sold her stock in the corporation to one Cable, who then was not only treasurer and president, but with the acquiescence of the directors also acted as manager of the corporation with a general control of its affairs. If thereafter there was any failure on the part of the board of directors properly to discharge the functions of their office, this delinquency is not shown to have been brought to the knowledge of the defendant.

Upon the purchase of this stock Cable made a large money payment, and gave her his promissory notes for the balance, so divided that one of them should mature at the beginning of each month for a period of five years. It was undisputed that upon these notes as they severally matured at least the sum of $13,000 was paid by checks drawn by him from time to time on the treasury of the corporation. The books of account disclose in detail the number and amount of these checks, and a balance was always struck by crediting as expense a lump sum sufficient to offset the debit items.

In his dealings, although in a few instances when he caused the checks to be made payable to the order of the bookkeeper who indorsed them either to himself or to the defendant, and upon one occasion when the check was made payable directly to her order, this course of dealing was uniformly followed. An examination properly conducted would have shown that when these monthly payments were received

[39] The statement of facts is abridged, and part of the opinion omitted.

as between Cable and the company his account would have appeared to have been constantly overdrawn; but the defendant had no actual knowledge of this condition of affairs, or that the money she was receiving came clandestinely from the corporation rather than lawfully from him.

The plaintiffs strenuously contend that, notwithstanding this, the form of the check should have suggested to her that he was misappropriating the funds of the company, and therefore she should be charged with constructive notice that he was using corporate assets for the payment of his maturing notes.

The early doctrine on this subject, so far as it relates to negotiable paper, is found in Ayer v. Hutchins, 4 Mass. 370, 372, 3 Am. Dec. 232, and in Thompson v. Hale, 6 Pick. 258, 261, where it is said that circumstances which ordinarily would excite the suspicions of a reasonably prudent and careful man were sufficient to put the party receiving negotiable paper not overdue upon his inquiry as to suspicious defects or infirmity of title in the prior holder. See, also, Cone v. Baldwin, 12 Pick. 545, 546.

The rule thus formulated gave way later to what has been called the modern doctrine, that neither knowledge of suspicious circumstances, nor doubts as to the genuineness of the title, nor gross negligence on the part of the taker, either, singly or together, are sufficient to defeat the holder's recovery, unless amounting to proof of want of good faith. Smith v. Livingston, 111 Mass. 342; Freeman's National Bank v. Savery, 127 Mass. 75, 79, 34 Am. Rep. 345; Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; Massachusetts National Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Goodman v. Harvey, 4 Ad. & El. 870; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 22 L. Ed. 645; Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78; Jones v. Gordon, L. R. 2 App. Cases, 616, 628, 629. See, also, Jones v. Smith, 1 Hare, 43.

At the time the first note of the series matured, and the first check in payment was given, St. 1898, p. 492, c. 533, commonly known as the "Negotiable Instruments Act," now Rev. Laws, c. 73, had become operative. By section 56 of the original act, now section 73 in the revision, the common-law rule shown by these decisions relating to implied notice to the purchaser for value of negotiable paper of a defect in the title of a previous owner was codified. The plaintiffs therefore cannot recover the proceeds of the checks unless the defendant took them in bad faith, and this inquiry is a question of fact. St. 1898, p. 501, c. 533, § 56; First National Bank of Chelsea v. Goodsell, 107 Mass. 149; Smith v. Livingston, 111 Mass. 342; Freeman's National Bank v. Savery, 127 Mass. 75, 34 Am. Rep. 345; Spaulding v. Kendrick, 172 Mass. 71, 51 N. E. 453.

If each check was signed by him as treasurer, this of itself was not such an affirmative representation as to indicate that he was acting in a

fiduciary capacity by which his authority was restricted and limited, as authority to draw and issue checks in the name of the corporation was incidental to his office, and the holder in due course of business would receive them under a presumption that they were issued lawfully. Shaw v. Spencer, 100 Mass. 382, 393, 97 Am. Dec. 107, 1 Am. Rep. 115; Merchants' National Bank v. Citizens' Gaslight Co., 159 Mass. 505, 507, 34 N. E. 1083, 38 Am. St. Rep. 453; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411. Compare Kneeland v. Braintree Street Railway, 167 Mass. 161, 162, 45 N. E. 86.

While the defendant may be held to have known that by purchasing her stock Cable had acquired control of the corporation, there does not appear to have been any reasonable ground for an assumption on her part that its business under his management was not profitable, or had been impaired and then ruined, until the company's assignment for the benefit of its creditors was announced. Before her retirement for at least two years they had been associated in conducting its business affairs, and neither during this period, nor after her withdrawal, is it shown that there was anything in his conduct indicating to her that he was dishonest or incompetent. There was therefore no reason why she should not have retained her confidence in him, and, even if her former experience had made her familiar with the duties of the office which he held, it could be found that she received the checks without realizing the possible fact that, notwithstanding their form, they were drafts upon the funds of the company in payment of her own debt.

It is more than probable that as note after note matured and payments were made in this manner she gave no thought to the general transaction, except to get her pay; but, if so, she still may have inferred that the money so appropriated was in payment of his own salary, or otherwise was being withdrawn lawfully. See Fay v. Noble, 12 Cush. 1, 16, 17. But while she may have been incautious and unsuspecting, where others more accustomed to mercantile affairs might have been mistrustful, there is no evidence that at any time she was possessed of any knowledge of what undoubtedly to a certain extent was an embezzlement on his part, or, having doubts as to how he obtained the money, she deliberately decided for her own advantage not to make any inquiries to ascertain why instead of paying with checks drawn on a bank account of his own, or in money, he used checks issued by him as treasurer, though if such conduct had been shown, then it might be inferred that she ignored significant facts with a purpose not to know anything more, and this would have been enough to indicate that, suspecting something was wrong, she intended to avoid the effect of the evidence. Kettlewell v. Watson, 21 Ch. D. 685, 706.

But having taken before maturity for a valuable consideration negotiable paper which was regular upon its face, without knowledge of any defect in the title, even if there might have been some circumstances which would have raised doubts in the mind of a more pru-

dent person, the defendant's right to retain the proceeds of the checks cannot be divested without proof that she knew, or in the face of facts sufficient to put her upon inquiry purposely refrained from knowing of the fraud of Cable, although, if obliged to bring suit upon them, after evidence had been introduced in defense that they had been fraudulently issued, the burden would have remained upon her to prove that she was a holder in good faith and for value. Bill v. Stewart, 156 Mass. 508, 31 N. E. 386; Massachusetts National Bank v. Snow, 187 Mass. 159, ubi supra; Holden v. Phœnix Rattan Co., 168 Mass. 570, 47 N. E. 241; Latam v. Hasler, 23 Q. B. D. 345.

While the form of procedure does not change this rule, we fail to find anything in the evidence reported sufficient to modify or overcome the conclusions of fact reached by the trial court, which determined that the defendant had sustained this burden.

Decree affirmed.

FOX et al. v. CITIZENS' BANK & TRUST CO. et al.

(Court of Chancery Appeals of Tennessee, 1896. 37 S. W. 1102.)

Bill by Fred Fox and others against the Citizens' Bank & Trust Company and others to enjoin defendant bank and trust company from further prosecuting suits on notes executed by complainants to J. C. Anderson, trustee, who indorsed them to the bank and trust company.

The cause was heard by the chancellor April 11, 1895. He held that the complainants were not entitled to the relief sought, inasmuch as the bank and trust company acquired the notes in good faith, for a valuable consideration, before their maturity, in due course of trade, and without any notice of the equities existing against them, or between the original parties thereto. So holding, he dismissed the original bill, dissolved the injunction that had been granted, gave the bank and trust company a decree for the amount of the notes, interest, and an agreed attorney's fee, and taxed complainants with the costs. From this decree complainants prayed and obtained an appeal to the Supreme Court, and have assigned errors.

Four errors are assigned, as follows: (1) Error in holding that the bank and trust company was an innocent purchaser of the notes, in due course of trade, and without notice of the equities of complainants; (2) because the notes, being payable on their face to J. C. Anderson, trustee, and showing that they were given for land, gave notice to the bank that Anderson was holder of the land and notes for somebody else; (3) error in not holding, under the evidence, that the bank was not a holder of the notes in due course of trade, but that it received them as collateral security for a pre-existing debt, except as to a $1,000, which was advanced at the time, but which was after-

wards paid; (4) error in not holding that the bank, at the time it took these notes as collaterals, had notice that the consideration for them had failed.

It is conceded that the consideration of these notes entirely failed.[40]

WILSON, J. It is next insisted that the notes, being payable on their face to Anderson, trustee, carried notice of the equities of complainants. Helleard, Vend. § 408, 1 Stay. 99, §§ 399, 400, and Covington v. Anderson, 16 Lea, 310, are cited. Beyond question, a trustee converting trust assets to his own use is liable to the beneficiaries; and equally liable is any one purchasing from him knowing of his fraudulent intention, as having knowledge of facts that would put a reasonably prudent man on inquiry as to the power and dishonest ends of the trustee, and which inquiry, if properly prosecuted, would discover the truth. This is the extent to which the authorities cited go. But we are unable to perceive the direct connection and application of the principle cited to the facts of this case. It is well settled that the fact that the consideration for which a note is given is stated in it will not destroy its negotiability, unless the recital qualifies the promise to pay, or renders it uncertain either as to the time of payment or the sum to be paid. And if the note be received before maturity, and before a failure of consideration, it will be held free from the equities, although, from the recital, it was known to the indorser that the consideration was future and contingent. Goodloe v. Taylor, 10 N. C. 458; Stevens v. Blunt, 7 Mass. 240; Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461; Bank v. Cason, 39 La. Ann. 865, 2 South. 881; Siegel v. Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51; Daniel, Neg. Inst. §§ 790–796. In other words, says the Louisiana Annual (2 South.) case and the cases in 131 Ill. 569, and 23 N. E. 417, "it cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed."

The argument or proposition is advanced by implication, at least, that the fact that these notes are made payable to Anderson, trustee, impaired their negotiability, or put a transferee on notice of all equities existing as between the maker and the trustee. In a contest between the beneficiaries of these notes, assuming that Anderson was not their real owner, and the transferee of Anderson, the fact that the notes appeared on their face to be payable to him as trustee would put the transferee on notice, and the claim of the beneficiaries would be superior[41] (Cardwell v. Cheatham, 2 Head. 14; Duncan v. Jaudon, 15 Wall. 175, 21 L. Ed. 142; Shaw v. Spencer, 100 Mass. 389, 97 Am. Dec. 107, 1 Am. Rep. 115; Alexander v. Alderson, 7 Baxt.

[40] The statement of the case is taken from the opinion, part of which is omitted.

[41] Accord: Ford v. Brown, 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188 (1904).

403), because the notes gave direct information that they were trust property, and the direct purpose of the transfer was to pay his individual debt (Covington v. Anderson, 16 Lea, 310).

The question as to whether a note payable to one as trustee is negotiable is a subject of dispute in the authorities or adjudged cases. In Maryland it seems to have been held that such a note is not commercial paper, and that an indorsement of it by the trustee transfers it, subject to the trust, and that, after such transfer, it is open to the equitable defenses between the original parties. Bank v. Lange, 51 Md. 139, 34 Am. Rep. 304. But it is holden in other jurisdictions that a note to and indorsed by one as trustee of a named person does not carry to an innocent purchaser any notice of a restriction upon the payee's right to transfer it. Downer v. Read, 17 Minn. 493 (Gil. 470); Bush v. Peckard, 3 Har. (Del.) 385; citing Rand. Com. Paper, § 158, p. 242; Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387, and note; Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529. As a general thing, the addition of the words "trustee" and the like will be treated as descriptio personæ. Authorities supra; 2 Am. & Eng. Enc. Law, p. 358, notes on pages 358 and 359.

We take it that the decided weight of authority, and, it seems to us, of sound reason, supports the position that the addition of the word "trustee" to the name of the payee of a note of itself does not destroy its negotiability. Under the rules of the common law, all conveyances by a trustee, whether to innocent purchaser or not, even if made in contravention of the trust, operated upon the legal title, and vested it in the grantee. The beneficiary had to go into equity, and there he could compel the grantee to respect the trust, as the original trustee should have done. Gale v. Mensing, 20 Mo. 461, 64 Am. Dec. 197, and notes; See, also, Tyler v. Herring, 67 Miss. 169, 6 South. 840, 19 Am. St. Rep. 263, and extended note where the subject, with the authorities, is fully presented. The substance or real rule, in the absence of a statute, in respect to unauthorized sales or transfers of property by trustees, is that they are voidable at the election of the parties in interest, and, until so avoided, the grantee has all rights in the property as to third parties. In this case there is no evidence that the notes did not belong to Anderson, or that he did not have the right to deal with them as he pleased.

The result is that, as to these complainants, the defendant bank is an innocent purchaser of the notes, for value, without notice of any equities in their favor; and, this being so, the decree of the chancellor is correct, and must be affirmed, with costs.

HARGER et al. v. WORRALL.

(Court of Appeals of New York, 1877. 69 N. Y. 370, 25 Am. Rep. 206.)

RAPALLO, J. This action was brought against the appellant and his copartner as acceptors of a bill of exchange drawn upon them by the Pittston & Elmira Coal Company, and transferred to the plaintiffs. The complaint contains all the necessary allegations to maintain the action, and among them an averment that after acceptance and before maturity, the bill was, for value received, sold, transferred and delivered to the plaintiffs. The answer does not deny any of the allegations of the complaint, but sets up as a defense that the bill was accepted by the defendants without consideration and solely for the accommodation of the coal company, and to enable them to raise money thereon, and that it was discounted by the plaintiffs for that company at a usurious rate of interest. No evidence was given by the defendants in support of this defense, except that the acceptance was without consideration as between the drawers and acceptors and solely for the accommodation of the drawers, and the referee so found. No proof was given by either party as to the amount paid by the plaintiffs for the bill, and the defendants claimed upon the trial and now insist that they having proved themselves to be mere accommodation acceptors, it was incumbent upon the plaintiffs to show what value they paid for the bill, and that their recovery should be restricted to the amount so paid.

Such would undoubtedly be the case had the acceptance been obtained by fraud or duress, or had it been fraudulently diverted from the purpose for which it was given. First Nat. Bank v. Green, 43 N. Y. 298. But, in the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value, and this presumption is not repelled merely by proof that the bill or note as between the immediate parties was without consideration, and was made, indorsed, or accepted by one for the sole accommodation of the other. When no other proof is given the holder is not bound to prove a valuable consideration. Ross v. Bedell, 5 Duer, 462; Mechanics' & Traders' Bank v. Crow, 60 N. Y. 85. The proof and finding that the bill in the present case was accepted without consideration, and solely for the accommodation of the drawer, constituted no defense to the action, and, as no other fact was proved on the part of the defense, the plaintiffs were clearly entitled to judgment. Grant v. Ellicott, 7 Wend. 229.

In the case of Bank of St. Albans v. Gilliland, 23 Wend. 311, 35 Am. Dec. 566, cited by appellant, the note was given for the accommodation of a firm, and applied by one member of the firm to his individual use. This was a clear misappropriation of the note, which threw upon the holder the burden of proving that it paid value. No such diversion appears in the present case. The other references by

counsel are to cases where one member of a firm has issued accommodation paper without the consent of his copartners. They are inapplicable here, as the acceptance by the firm is admitted in the pleadings.

The judgment must be affirmed.[42]

TATAM v. HASLER et al.

(Queen's Bench Division, 1889. 23 Q. B. D. 345.)

The plaintiff sued upon a bill of exchange for £500., drawn by the defendant Johnstone, and accepted by the defendant Haslar, payable to the order of Johnstone, and indorsed by him to the plaintiff. Judgment had been signed against Johnstone, but Haslar, having obtained leave to defend, pleaded that he had accepted the bill and handed it to one Leslie for the purpose of getting it discounted for him, that there was no consideration for his acceptance, and that Leslie fraudulently handed over the bill to Johnstone, who fraudulently indorsed it to the plaintiff, who took it without consideration and with notice of the fraud.

At the trial, before Field, J., and a jury, the plaintiff gave evidence of the fraudulent negotiation of the bill, which the judge held to be sufficient to throw upon the plaintiff the onus of proving that he gave value in good faith. The plaintiff gave evidence, and proved that he had given £450. for the bill, and also alleged that he had bought the bill honestly, without notice of the fraud.

The learned judge, in his summing-up, told the jury that the onus was on the plaintiff to satisfy them that he really gave value for the bill, but on the defendant to satisfy them that the plaintiff took the bill under such circumstances as to invalidate his title, because he had, or ought to have had, notice of the fraud. The learned judge also told the jury that the plaintiff was a bona fide holder for value, if he really and truly advanced the value alleged by him.

The jury found a verdict for the defendant, and the plaintiff moved that judgment might be entered for him, or a new trial had, on the ground that the judge misdirected the jury in telling them that there was evidence of circumstances which should have put the plaintiff upon inquiry, and that the verdict was against the weight of evidence.[43]

DENMAN, J. The summing-up of the learned judge has been read through and fully commented upon, and I have come to the conclusion that, upon the true construction of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), he put the case too favorably for the

[42] Accord: Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. Supp. 1043 (1903). See Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666 (1903)

[43] The arguments of counsel, and the opinion of Charles, J., are omitted.

plaintiff. Inasmuch as the argument in this case has turned to a great extent upon what is the present state of the law under the Act, I think that we must express our opinion upon it. The first clause with which we must deal is section 30, subsec. 2, which provides that "every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, * * * the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." Now the learned judge told the jury that, if money had really and in fact been given for the bill, value had in good faith been given. I have never so read this section of the act; and I think that the attention of the learned judge could not have been called to the other clauses of the act. Giving "value in good faith" must mean something more than the mere actual and real passing of money or other value, and this appears clearly when the other clauses of the Act are looked at. A "holder in due course" is, by section 29, subsec. 1 (b), defined to be a person who has taken a bill in good faith and for value and without notice of any defect in the title of the person who negotiated it. Then section 30, subsec. 2, says, in effect, that, if fraud in the inception or negotiation of a bill is proved or admitted, the holder must prove that he is a holder in due course as defined by section 29, subsec. 1 (b). Again, section 90 says that "a thing is deemed to be done in good faith * * * when it is in fact done honestly, whether it is done negligently or not." This clause is obviously founded upon the distinction, which is pointed out by Lord Blackburn in Jones v. Gordon, 2 App. Cas. 616, at page 629, between honest blundering or carelessness and a dishonest refraining from inquiry. Applying that construction to the words "value given in good faith" at the end of section 30, subsec. 2, it appears to me that those words mean value given honestly and without any notice of the fraud, in the sense explained by Lord Blackburn, and not merely the actual giving of value.

The words of section 30, subsec. 2, "if it is admitted or proved," mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury. That was the old law, as stated in Hall v. Featherstone, 3 H. & N. 284, which has not, I think, been altered by this act. When, therefore, some sufficient evidence of fraud has been given, as in this case, the onus is on the plaintiff to prove both that he gave value and that he had no notice of the fraud in the sense explained by Lord Blackburn in Jones v. Gordon, 2 App. Cas. 616, at page 629.

In this case there was evidence of fraud which could not have been withdrawn from the jury, and their verdict on that point cannot be set aside as against the weight of evidence. The onus of proving that he had no notice being upon the plaintiff, it was essentially a matter for the jury to say whether he had satisfied them on that

point, and I think that even had the onus been upon the defendant there was evidence upon which the jury were entitled to find a verdict for him. The verdict, therefore, cannot be disturbed.[44]

KERR v. ANDERSON.

(Supreme Court of North Dakota, 1907. 16 N. D. 36, 111 N. W. 614.)

MORGAN, C. J. Action upon a promissory note by the plaintiff, as indorsee, against the defendant, as maker thereof. The complaint alleges the execution and delivery and nonpayment of the note at maturity, and that the same was duly indorsed to the plaintiff before maturity for a valuable consideration in due course of business. The answer is a general denial. A jury was impaneled. Plaintiff established the due indorsement of the note by the payee, and offered the note in evidence, which was received without objection, and thereupon rested. Defendant rested without offering any evidence. Plaintiff moved the court to direct a verdict in his favor, and the motion was denied. The defendant then moved for a directed verdict in his favor, which was granted. Plaintiff excepted to the rulings on each of these motions. Plaintiff thereafter moved for a judgment notwithstanding the verdict, and for a new trial. Both motions were denied. Plaintiff appeals from the order denying these motions.

The record does not disclose the grounds upon which the trial court granted defendant's motion for a directed verdict. In their printed argument, the defendant's attorneys attempt to sustain the trial court's action upon the ground that plaintiff offered no evidence to show that he was an innocent purchaser of the note before maturity. It was not necessary to offer such evidence. The presumption is that the indorsement was made in the regular course of business. The statute expressly so declares, and every holder of negotiable instruments is deemed prima facie to be a holder in due course, unless the title of the person negotiating the instrument is shown to be defective for fraud or other reasons. When this is shown, the burden is then upon the holder to show that he took the instrument in due course. Section 6361, Rev. Code 1905.[45] This court has often held that the

[44] Contra: Hodge v. Smith, 130 Wis. 326, 336, 110 N. W. 192 (1907).

[45] Accord: Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805 (1905); Johnson County v. Walker, 79 Conn. 348, 65 Atl. 132 (1906); Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081 (1906); Abmeyer v. Bank, 76 Kan. 877, 92 Pac. 1109 (1907); Engle v. Hyman, 54 Misc. Rep. 251, 104 N. Y. Supp. 390 (1907).

"The instruction in question ought to have been refused. Its rejection was proper for the reason, if there were no other, that it required the jury, if they believed either fraud or illegality in the inception of the bonds to have been established, to find for the township, unless the plaintiff proved that he purchased for value or gave some consideration for them. Such is not the law; for, if any previous holder of the bonds in suit was a bona fide holder for value, the plaintiff, without showing that he had himself paid value,

holder of a negotiable instrument is not primarily bound to establish that he is an innocent purchaser. Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Id., 10 N. D. 194, 86 N. W. 704. Plaintiff produced the note in court duly indorsed, and by so doing established prima facie that he acquired title thereto in due course of business.[46] Daniel on Neg. Ins. § 812, and cases cited.

The fact that plaintiff alleged in his complaint that the note was purchased by him before maturity did not make it incumbent on him to establish that fact by evidence. The statutory presumption was in force with or without such allegation. It was therefore error to direct a verdict in defendant's favor. Plaintiff requests this court to order judgment in his favor notwithstanding the verdict. This is not a proper case for such a judgment. Defendant may be able to show upon another trial that the allegations of the complaint are not true. * * *

Order reversed.

SECTION 3.—EQUITIES

WHITEHEAD v. WALKER.

(Court of Exchequer, 1842. 10 Mees. & W. 696.)

Assumpsit by the assignees of the indorsee against the indorser of a bill of exchange. The declaration stated, that on the 8th of August, 1834, and before the bankruptcy of Benbow, certain persons made their bill of exchange in writing, directed to Grayhurst & Co., and payable to the defendant; that the defendant indorsed the bill to W. Swainson, who indorsed it to Willis & Swainson, who indorsed it to Benbow before his bankruptcy. Averment, that Grayhurst & Co. refused to accept the bill, and that the same was protested, etc. See the former case of Whitehead v. Walker, 9 Mees. & W. 506.

Plea, that after the indorsement of the bill to Willis & Swainson, and before and at the time when it was indorsed by them to Benbow, Willis & Swainson were, and still are, indebted to the defendant in certain large sums of money, amounting in the whole to £1,000., in respect of certain bills of exchange, etc., goods sold and delivered, etc. Averment, that the said sums so due from Willis & Swainson

could avail himself of the position of such previous holder." Montclair v. Ramsdell, 107 U. S. 147, 159. 2 Sup. Ct. 391, 27 L. Ed. 431 (1882).

See, also, to the same effect, Bryan v. Harr, 21 App. D. C. 190 (1903); Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607 (1904); Symonds v. Riley, 188 Mass. 470 (1905).

[46] Accord: Karsch v. Pottier Co., 82 App. Div. 230, 81 N. Y. Supp. 782 (1903); Colborn v. Arbecam, 54 Misc. Rep. 623, 104 N. Y. Supp. 986 (1907). But see McGehee v. Cooke, 55 Misc. Rep. 40, 105 N. Y. Supp. 60 (1907).

to the defendant exceeded the amount of the said bill of exchange, of all which premises Benbow, at the time of the said indorsement thereof to him by Willis & Swainson, had notice, and that the said bill was indorsed by them to Benbow, after it had so been refused acceptance and had been protested as in the declaration mentioned, and after it had become due. Verification.

Replication, de injuria.

Special demurrer, and joinder therein.[47]

PARKE, B. It is unnecessary to determine whether the replication is good or not, for we think the plea is bad in substance, on the authority of Burrough v. Moss.[48] That case decides that the indorsee of an overdue promissory note takes it, as against the maker, with all the equities arising out of the note transaction itself, but not subject to a set-off in respect of a debt due from the endorser to the maker of the note, arising out of collateral matters. For example, if the note be released or discharged, the plaintiff under such circumstances cannot make a title to it. But a set-off is not an equity; it is a mere collateral matter; it is a right to set off a cross-demand against the plaintiff's cause of action, which was introduced to prevent a multiplicity of actions. The case of Burrough v. Moss is good law, and has been recognized in this court. Nor do I think that case is affected by the decision of Coleridge, J., in Goodall v. Ray, 4 Dowl. P. C. 76. It seems to me that either there must be some inaccuracy in the report, or there must have been in that case that sort of formal notice to the plaintiff which is equivalent to an agreement to set off the cross-demand as against him. On that ground the case may perhaps be supported; otherwise I cannot assent to the position that a mere notice of a set-off between the payee and the maker can operate to restrict the negotiability of a promissory note. Besides, the decision of the point was unnecessary in that case, inasmuch as the plaintiff's demand was for a sum less than the amount of the note. I cannot, therefore, consider that case as an authority that mere notice of the set-off makes any difference. Our judgment must be for the plaintiffs.

ALDERSON, B. I am of the same opinion. If the doctrine advanced on the defendant's part were correct, no one would be able to tell whether certain instruments were negotiable or not; for their negotiability would depend on the will of a third person. No one could tell whether the maker would set off his claim against the prior party or not. If he will not, the note is negotiable; otherwise, it is not. Burrough v. Moss, lays down the true rule, that the indorsee of an overdue bill is subject to those equities, and those only, which affect the bill itself.

GURNEY, and ROLFE, BB., concurred.

Judgment for the plaintiffs.

[47] The arguments of counsel are omitted.

[48] 10 Barn. & C. 558.

RANGER v. CARY.

(Supreme Judicial Court of Massachusetts, 1840. 1 Metc. 369.)

See ante, p. 327, for a report of the case.

BAXTER v. LITTLE.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1843. 6 Metc. 7, 39 Am. Dec. 707.)

This action was by the indorsee against the maker of a promissory note for $330, dated March 1, 1837, payable to Joseph Harris, Jr., in four months, and by him indorsed. The action was commenced October 4, 1839.

At the trial before the Chief Justice, the signatures of the maker and indorser were admitted by the defendant, and he relied upon a set-off of notes against the Franklin Bank, upon the ground that the note in suit was held by that bank, after it was due, and that he had a right to make the same defense against the plaintiff as if the action were brought by the bank.

In order to present the question of law, it was mutually conceded that the note was discounted by the Franklin Bank in the due course of business; that it was held by the bank when it became due; that afterwards, and after the bank had stopped payment, in pursuance of a vote of the directors to pay the debts of the bank in such securities as they had, the note in question, on the 20th of December, 1837, was delivered to the plaintiff, or to the person under whom the plaintiff claims title, in exchange for bills of said bank, at par, which bills were then at a discount in the market; that before this action was brought—upon notice of the plaintiff's attorneys that they had such a note, and demanded payment thereof, but without notice to the defendant that the note had been transferred by the bank—the defendant tendered to said attorneys, in satisfaction of the note, bills of the Franklin Bank, which they declined to accept; that the defendant has ever since had said bills, and has filed them in offset in this action, and now relies upon that tender and set-off.

It was agreed that judgment should be entered by the plaintiff if in the opinion of the court he was entitled to recover; otherwise, that the plaintiff should become nonsuit.[49]

SHAW, C. J. When a negotiable note is indorsed and transferred after it is due, and the defendant relies upon matter of set-off which he may have against the promisee, he can avail himself only of such matter of defense as existed between himself and the promisee, at

[49] The arguments of counsel are omitted. Baxter v. Harris is reported with the principal case, but everything relating to that action is omitted.

the time of the actual indorsement and transfer of the note to the holder. A note does not cease to be negotiable, because it is overdue. The promisee, by his indorsement, may still give a good title to the indorsee. Notes or other matters of set-off, acquired by the defendant against the promisee, after such transfer, cannot be given in evidence in defense to such note, although the maker had no notice of such transfer at the time of acquiring his demand against the promisee. Having made his promise negotiable, he is liable to any bona fide holder and actual indorsee; and therefore, even after the note has become due, in making payments to the original promisee, or in further dealings by which he gives him a credit, he has no right to presume, without proof, that the promisee is still the holder of the note. Besides, in case of payment of a negotiable note, or of a credit which the maker intends shall operate by way of payment, he has a right to have his note given up, if paid in full, or to see the payment indorsed, if partial. Should he insist on this right, in the case proposed, he would at once perceive that the person to whom he is making payment or giving credit is no longer the holder of the note. And this appears to us to be the true distinction between the indorsement of a note overdue and the assignment of a chose in action. In the latter case, notice of the assignment must be given by the assignee to the debtor, to prevent him from making payment to the assignor. Without such notice, he has no reason to presume that the original creditor is not still his creditor; and payment to him is according to his contract and in the due and ordinary course of business. The assignee takes an equitable interest only, which must be enforced in the name of the assignor; and, until notice, he has no equity against the debtor, which can be recognized and protected by a court of law or equity. The indorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and therefore subject to all payments and offsets in the nature of payment. The ground is that by this fact he is put upon inquiry, and therefore he shall be bound by all existing facts, of which inquiry and true information would apprise him; but these could only apprise him of demands then acquired by the maker against the payee. * * *[50]

The defendant Little, the maker of the note now in suit, not having shown that he held the bills of the Franklin Bank at the time that his note was transferred to the plaintiff, he cannot set them off in this suit. In a case in New York, it was held that bills of a bank, held by the defendant when his note became due, could not be set off in an action brought on the note by receivers appointed previously. Haxton v. Bishop, 3 Wend. (N. Y.) 13.

The English rule, in allowing set-off in an action upon a note, is somewhat more limited than our own, confining such defense to equi-

[50] The Chief Justice here discussed the case of Sargent v. Southgate, 5 Pick. 312, 16 Am. Dec. 409.

ties arising out of the same note, or transactions connected with it. Burrough v. Moss, 10 Barn. & Cres. 558. Here it has been held that an independent demand may be set off, where in other respects the party is entitled to go into that defense. Sargent v. Southgate, 5 Pick. 312, 16 Am. Dec. 409; Ranger v. Cary, 1 Metc. 375.

Since the decision in Sargent v. Southgate, the principle decided by it has been confirmed, and the whole subject of set-off placed, by Rev. St. c. 96, upon grounds more distinct and satisfactory than it was under the former statutes. * * *

Judgment for the plaintiff.[51]

PROUTY v. ROBERTS.

(Supreme Judicial Court of Massachusetts, Hampshire, Franklin, and Hampden, 1850. 6 Cush. 19, 52 Am. Dec. 761.)

This was an action of assumpsit on a promissory note signed by the defendant, payable to Daniel Whitney or order, on demand, and indorsed by Whitney. The note was dated on the 12th of August, 1849, and was put in suit on the 22d of October following.

The defendant pleaded the general issue, and offered evidence to prove that the note declared on was still the property of Daniel Whitney, the payee, and was never legally transferred by him, but was got out of his possession, by false and fraudulent pretenses, by Hart & Forbes, who represented that they had $700 deposited in the savings bank in Greenfield, which they would draw out and loan to him, if he would give them the note, by means of which pretenses they got possession of the same; that these representations were false; that Hart & Forbes had not and never had any money deposited in the savings bank; that the plaintiff, at the time he got possession of the note, knew that the same was thus fraudulently obtained from Whitney; and that he obtained it for a small consideration, much less than half the sum for which it was given.

The presiding judge (Mellen, J.) ruled that the above facts, if proved, would not constitute a defense in behalf of the defendant. A verdict was thereupon rendered for the plaintiff, and the defendant excepted.

PER CURIAM. The directions we think were right. The plaintiff proved a legal title to the note, and the facts proposed to be proved by the defendant could afford him no ground of defense. It was no

[51] Accord: Driggs v. Rockwell, 11 Wend. (N. Y.) 504 (1833). Contra: Gemmell v. Hueben, 71 Mo. App. 291 (1897). Compare Marling v. FitzGerald, 138 Wis. 93, 101, 120 N. W. 388, 23 L. R. A. (N. S.) 177 (1909); and see Freittenberg v. Rubel, 123 Iowa, 154, 98 N. W. 624 (1904).

fraud upon the defendant; he was called upon to pay only what he had undertaken to pay; and payment to the plaintiff would be a good discharge. Knights v. Putnam, 3 Pick. 184.

Judgment on the verdict.

CARRIER v. SEARS.

(Supreme Judicial Court of Massachusetts, Berkshire, 1862. 4 Allen, 336, 81 Am. Dec. 707.)

HOAR, J.[52] This action is by the indorsee of a promissory note against the maker; and the defendant offered to prove that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid indorsement. This evidence was rejected, and we think it ought not to have been admitted. An indorsement is a contract; and the contract of an insane person, or one obtained by fraud or duress, is voidable and not void. 2 Bl. Com. 291; 2 Kent, Com. (6th Ed.) 451; Seaver v. Phelps, 11 Pick. 304, 22 Am. Dec. 372; Allis v. Billings, 6 Metc. 415, 39 Am. Dec. 744; Arnold v. Richmond Iron Works, 1 Gray, 434; Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414. The right to avoid it is a personal right, which can only be exercised by the insane person, or his guardian, or representatives. The contract is binding upon the party who is of sound mind, and his rights under it are not affected until it is avoided by the party entitled to disaffirm it. The property passes as to third persons.

The only case cited by the defendant upon this point is Peaslee v. Robbins, 3 Metc. 164. That was an action upon a note by an indorsee against the promisor, and evidence was offered tending to prove that the payee, when he indorsed the note, had not sufficient mental capacity to make a valid transfer of it. To establish this, evidence was admitted as to his incapacity at the time the note was made to him, as well as after; and the admissibility of this evidence was the question raised upon the bill of exceptions. This court held that it was admissible, as tending to show his state of mind at the time he indorsed it. Whether his want of mental capacity was a defense of which the defendant could avail himself does not appear to have been questioned by either party, or by the court. Judge Wilde, in delivering the opinion, says: "The plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows, as a necessary consequence, that the defendant must be allowed to impeach the plaintiff's title to the note by showing that the indorsement was void. Evidence, therefore, of the indorser's mental incapacity to make a valid contract, at the time he indorsed the note, was material evidence; and not the less material because the same incapacity existed when the note was signed."

[52] Part of the opinion is omitted.

These remarks of the learned judge, unexplained, would certainly countenance the position taken by the defendant in the case at bar; and the report, as it stands, does not afford the necessary explanation. The point decided was only that evidence of insanity at one time was competent as tending to prove insanity at a time shortly after. But the fact in the case was, as I well remember, that the defendant had been notified by the guardian of the insane payee not to pay the note to the plaintiff; and the defense was conducted by the guardian for the benefit of his ward. We have examined the record, and find in the original specification of defense the statement "that said Fletcher, as guardian to said Parker (the payee of the note), claims said note as the property or estate of said Parker." There was no controversy upon this point; and, the guardian having claimed and exercised the right to disaffirm and avoid the indorsement, the only question was upon the metal incapacity of the payee at the time the indorsement was made. The language of the court was therefore perfectly warranted in its application to the circumstances of the case, as it was presented and understood by the parties, but would require limitation if taken as the enunciation of a general principle. * * *

CLARK v. PEASE et al.

(Supreme Judicial Court of New Hampshire, 1860. 41 N. H. 414.)

This is an action of assumpsit, counting upon the promissory note of the three defendants, dated July 26, 1858, for $112.50, payable to one Theodore P. Clark, or order, on the 1st day of the following November, and by the payee indorsed and delivered, on the day of its date, to the plaintiff. There was also a count for money had and received, to the amount of $300. Plea, the general issue.

The defendants offered to prove that, on the day before the giving of the note, all of the makers except Charles Pease were arrested at Ellsworth, in Grafton county, by Calvin Clark, a deputy sheriff, by the procurement and with the aid of the payee, and held by them in custody until the next day, when they were carried by them to Plymouth, and there held in custody until, to effect their liberation, this note was given, the said Charles Pease signing as the surety of the others; that the arrest was made without any warrant or other lawful authority, but it was represented by the sheriff that they were arrested for the criminal offense of malicious mischief, and that he had the right to arrest them without a warrant; that this note, with two others, amounting in all to $250, was given to said Theodore P. Clark to obtain the release from duress of the three principals in the note, and upon the promise by the payee that they should then be set at liberty, and he would prosecute them no further; and upon the execution of the note they were set at liberty accordingly.

The plaintiff excepted to this evidence, as no defense against the indorsee, without proof that he was not the bona fide holder of the note. But the court ruled that, if the note was obtained by duress, it was void in the hands of an innocent indorsee, and thereupon the plaintiff, admitting for the purposes of this trial that the defendants' witnesses would testify to the facts stated, a verdict for the defendants was taken by consent, subject to the opinion of the court; and the questions thus raised were reserved, and assigned to the determination of the whole court.[53]

SARGENT, J. That the case presented is clearly one of duress there can be no question. The abuse of any process, either civil or criminal, to compel a party, by imprisonment, to do any act against his will except to pay the debt for which he is arrested, is entirely illegal, and the act may be avoided on the ground of duress. Richardson v. Duncan, 3 N. H. 508; Severance v. Kimball, 8 N. H. 386; Shaw v. Spooner, 9 N. H. 197, 32 Am. Dec. 348; Burnham v. Spooner, 10 N. H. 523; Breck v. Blanchard, 22 N. H. 303. Here the arrest was without any warrant or lawful authority. Such duress is a perfect defense, upon all the authorities, to an action between the original parties.

The note in this case was not only void as between the original parties, on the ground of duress, but was given to compromise a charge of crime, and was wholly illegal upon that ground. Plumer v. Smith, 5 N. H. 553, 22 Am. Dec. 478. But the principal question raised here by the ruling of the court is whether such a note is absolutely void in the hands of any holder; and if not, then another question arises upon the exception which was taken by the plaintiff, which is this: After an indorsee has made out a prima facie case by proving the indorsement, etc., and the defendant has shown that the note was obtained from him by duress, upon whom rests the burden of proof? Must the defendant prove that the plaintiff was not the bona fide holder, and that he did not pay a valid consideration for it, as the plaintiff claimed? or, the duress being proved, does that throw the burden of proof upon the plaintiff, to prove how he came by the note, and the consideration he paid, etc., as the defendant claims? We will examine these questions in the order in which we have stated them.

I. Is this note absolutely void in the hands of any holder, however innocent, who has paid a valid consideration for it before it was due?

We find that the law holds certain persons to be incompetent parties to make contracts, on account of want of capacity. It has, therefore, wisely taken care of the interests of those who either have not judgment to contract, as in the case of infants, or who, having judgment to contract, cannot in law have any funds or property to enable them to perform the contract, as in the case of a feme covert; and there-

[53] The arguments of counsel are omitted.

fore it has in general rendered the contracts of infants voidable, and those of married women absolutely void. Ch. on Bills, 18. By our law an infant has not capacity to bind himself absolutely by a promissory note, as maker or indorser. Story, Prom. Notes, § 78. So a married woman is incapable, in any case, of becoming a party to a note or bill so as to charge herself with any obligation whatever ordinarily arising therefrom. So contracts made with an alien enemy are absolutely void, upon the ground of disability to contract. This principle has its origin and confirmation in the law of nations. Persons insane, or imbecile in mind, have not the mental capacity to contract. This disability flows from the most obvious principles of natural justice, because persons in that condition—lunatics, idiots, and persons non compos mentis—being bereft of their reason, are, by the rules not only of municipal law but of universal justice, held to be utterly incapable of making contracts, and generally their contracts are absolutely void. Story, Prom. Notes, §§ 85, 94, 100, 101; Edwards, Bills & Notes, c. 2. There are some other parties that are held to be incompetent to contract, but these are the principal; and there are also some exceptions to some or all of the general rules above stated, which are not now important to be noticed. These doctrines are all familiar as elementary principles.

Contracts, therefore, purporting to be entered into by either of the above parties, are either void, or voidable, as the case may be, alike as against the other party to the original contract, and also, where the contract is assignable, they are void as to such incompetent parties, or are voidable by them, in the hands of any assignee or indorsee. These rules of law are founded upon the most common principles of natural justice and of public policy.

There are numerous other contracts, which, though made between competent parties on both sides, are nevertheless void as between such original parties. A contract made on Sunday, where the transaction of such business is prohibited, is an illegal contract, and void as between the parties. So a contract based upon an illegal consideration—as usury, gaming, spirituous liquors sold without license contrary to law, the compounding of a felony, etc.—is void as between the parties. So a contract without consideration, nudum pactum, and one where the consideration has failed, as between the immediate parties, is void or voidable. So a contract entered into by compulsion under duress, or obtained by fraud, or circumvention of one in a state of intoxication, is void as between the parties. Other cases might be stated (see Ch. on Bills, 82–87), but these are sufficient for our present purpose. Where the contract itself is illegal, or is founded upon an illegal consideration, the parties are usually both violators of the law, and stand in pari delicto. In such case any contract for the payment of money or the performance of any service cannot be enforced as between the parties; nor, if money has been paid or property transferred by one party to the other under such contract, where both par-

ties are alike in fault, can it be recovered back, because in such cases "potior est conditio possidentis." But in cases of duress, fraud, or circumvention, the fault was all upon one side, and the innocent party, upon whom the duress or the fraud was practiced, may not only avoid the contract entered into under these circumstances, but if he pay money, or deliver property, he may recover it back again. Now bills and notes stand upon the same foundation as all other contracts do, in all the above respects, so long as they remain in the hands of the original payee.

But bills and notes have another attribute, which other contracts ordinarily do not possess; that is, negotiability. Where a bill or note has been negotiated, and passed into the hands of a bona fide holder before it is due, and for a valuable consideration, in such case the holder acquires rights which did not belong to the payee. He stands in a different relation to the promisor. These additional rights and privileges have been conferred upon such holder by law, for good and sufficient reasons, too well known and understood to need to be stated, but which are incident to and dependent upon the attribute of negotiability, which these instruments possess. And it may be laid down as the general rule, as the general principle applying to this class of cases, that such a note, thus negotiated and in the hands of such a holder, is not liable to any defense which the maker had as against the original payee. To this general rule there are some exceptions, among which are:

1. When a statute not only prohibits the making of a contract, but provides that the same shall be void to all intents and purposes, or where the law provides that any contract made or securities given upon any illegal consideration shall be absolutely void, then the note which embodies such contract, or is based upon such consideration, is held void, everywhere and in the hands of every holder. In England, and in most of the United States, there are or have been laws against usury, which not only, by a general prohibition of usury, made that an illegal consideration for a note, but also provided that all bills or notes founded upon such a consideration should be absolutely void. Such, however, is not the law in this state on that subject, and it is believed that we have no statutes with similar provisions. Hence here usury may be a good defense to a note as against the original party, but not as against an innocent indorsee, for value, etc.

2. When the note is a forgery, it is void everywhere.

3. When the maker belongs to a class of persons who are ordinarily, and as a general rule, on grounds of public policy, held incompetent to contract at all, such as infants, married women, alien enemies, and insane persons, including spendthrifts and others under guardianship, who have been by some statute declared incompetent to contract.

4. Notes signed by agents without authority.

In none of these cases (except the first, which, as we have seen, does

not apply in this state) is a note valid in the hands of any one; and the party who discounts such paper is bound to inquire, at his peril, whether the note offered to him is signed by a party capable and competent in law to bind himself, or by an agent duly authorized to bind his principal. Beside this, he is bound to inquire whether the party from whom he receives it is competent to make such transfer in his own right, or is authorized to do it for his principal, for whom he assumes to act.

If there is a failure in either of these points of capacity or authority, it will not avail the party that he is a bona fide holder, for value, without notice. He must look to his indorser if he has one, and if he has not he must suffer loss.

5. Another case might be mentioned, which has been made an exception to the general rule above stated by express provisions of the statute—as where a note is attached by the trustee process. There, by operation of the statute, the maker of a note may have a perfect defense against an indorsee, for value, without notice, and before due. So notes discharged by operation of insolvent laws might afterward be transferred, by possibility, so as to form another exception, where the indorsee, holding the note bona fide, etc., might be met with a perfect defense on the part of the maker. But these last cases throw no light upon the question we are considering. These are the principal, perhaps all the exceptions to the general rule above stated, that no defense is available against an innocent indorsee, for value paid before due. But where the contract was illegal, being prohibited by law, or the consideration was illegal, as usury, wagers, compounding a felony, restraint of trade or of marriage, etc., or where there was a want or failure of consideration, and even where the note has been paid—all these defenses, and many more, cannot be made against the note in the hands of such a holder. And the question here raised is whether, in case of duress or fraud, where there is mala fides, but it is all on one side, and the other party to the note has been induced to sign it by force or by fraud, and is in every respect an innocent party, such defense shall avail him as against such a holder, for value, etc., who seeks to collect it.

And we think such a defense cannot avail the maker against such an indorsee of the note. The authorities favor this view. Kent, in his Commentaries (volume 2, § 39), speaks of contracts generally, and on page 453 says: "If a contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by plea of duress; and it is requisite to the validity of every agreement that it be the result of a free and bona fide exercise of the will. Nor will a contract be valid if obtained by misrepresentation or concealment," etc.

He here speaks evidently of the contract as between the original parties to it, or of contracts in general as distinguished from negotiable

notes and bills; because he devotes another chapter especially to a consideration of bills and notes, in which he says, in speaking of the right of the holder (volume 3, pp. 79, 80), that a bona fide holder can recover upon such note, though it came to him from a person who had stolen or robbed it from the true owner, provided he took it innocently in the course of trade, for a valuable consideration, and under circumstances of due caution; and he need not account for his possession of it unless suspicion be raised. This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. Suspicion must be cast upon the title of the holder by showing that the instrument had got into circulation by force or fraud, before the onus is cast upon the holder of showing the consideration he gave for it.

Chitty says (Ch. on Bills, 72): "In general there will be a sufficient defense between the original parties when the bill or note was obtained by duress, or by fraud, or by circumvention," etc. But he nowhere intimates that any of these defenses would be good against an innocent indorsee; but, on the contrary, he expressly says (page 79): "The circumstance of a bill or note having been obtained without adequate consideration, or even by duress or fraud, or misapplied by an agent to his own use, affords no defense where the instrument comes into the possession of a bona fide holder, for value, without notice, and before it is due."

So in Edwards on Bills and Promissory Notes (page 325) it is said that "between the immediate parties it may be shown, by way of defense, that a bill or note was obtained by duress, or by fraud, or by circumvention," etc.; but he nowhere intimates that any of those circumstances would constitute an exception to the rule which he states (page 56), that the bona fide holder of negotiable paper, who has paid value for it before its maturity, or who has relinquished some available security or valuable rights on the credit thereof, is entitled to protection, and may recover thereon notwithstanding some of the previous holders procured the same by fraud.

So in Story on Promissory Notes (section 188) it is said, under the head of want of consideration, that notes obtained under duress are void; but it is also said (section 191) that the want or failure of consideration, or mere fraud between the antecedent parties, will be no defense or bar to the title of a bona fide holder of the note, for value, etc. Now we are not able to see what distinction there could be, in fact, between a note the signature to which was obtained by fraud and one where the signature was obtained by duress. Both are equally void as between the original parties; and there can be no better reason in the one case for holding the note void in the hands of a bona fide holder than in the other. "It is requisite to the validity of every agreement that it be the result of a free and bona fide exercise of the will." 2 Kent, Com. 453, ante. Upon this ground, fraud in obtaining the sig-

nature would be fatal to precisely the same extent as would duress; there would be no "free and bona fide exercise of the will" in the one case more than in the other.

In Doe v. Burnham, 31 N. H. 431, the rule is laid down very broadly, and without those qualifications and exceptions which we have heretofore seen must necessarily always accompany it. Eastman, J., delivering the opinion in that case, says that, where a note is indorsed in the usual and ordinary course of commercial business, all the authorities "sustain the broad rule that a bona fide holder for a valuable consideration, who becomes such before the dishonor of the note, takes it free from all defenses between prior parties." And see cases there cited. He also quotes Shaw, C. J., in Wheeler v. Guild, 20 Pick. 545, 32 Am. Dec. 231, as stating the rule in Massachusetts substantially in the same way, and then adds: "We are not aware that in this state there is any exception to the universality of the rule."

Now this rule, in the general and broad terms in which it is here laid down, is at once seen to be incorrect, because in case of notes forged, or signed by an agent having no authority, or by an infant, a married woman, an alien enemy in time of war, or an insane person, exceptions to this rule have been seen to exist necessarily. But if the intention was merely to state a general rule, subject to such limitations and exceptions as general rules are usually subject to, it is undoubtedly correct; and in that view it is broad enough to cover our present case, because in this case the signature to the note is genuine, and no forgery. No question of agency or authority arises, nor does the signer belong to either of the classes whom the law holds incompetent to contract.

Suppose an individual, then, were about to purchase a note payable to bearer, before it was due, and pay a fair equivalent for it, with a view of collecting it of the maker, and where he is to have no indorser to rely upon; what would be his duty in order to proceed safely? First, he must assure himself of the genuineness of the signature, or, if it purported to be signed by an agent, he must assure himself that the agent was duly authorized to bind his principal in that particular; secondly, he must make such inquiries, which, ordinarily, he may easily do, as to ascertain that the signer is not an infant, a married woman, an alien enemy, an insane person, etc.—that he does not belong to a class of persons who are always presumed by the law to be incompetent to contract; and, thirdly, he might need, for his own safety, to inquire whether the signer of the note had been trusteed, or whether any other special statute could affect his claim to it. When he has satisfied himself upon these points, if he learns of no other defects and the signer is of sufficient ability to respond, he may purchase; and there is generally very little trouble in ascertaining these facts. They are usually matters of public notoriety, about which there can be little room for mistake.

But suppose that, after being satisfied upon all these points, and having purchased the note, it should prove that it was an illegal contract,

or was for an illegal consideration; who shall suffer, the maker, or the indorsee? This is settled on the best of authority. The original parties stood upon equal ground, both being in fault, and could neither of them enforce the contract; yet neither shall be allowed to take advantage of his own wrong as against an innocent indorsee.

And suppose it should turn out that his note was obtained of the maker by fraud or by duress, a case in which the maker was in no fault; what rule shall be applied here? The long-established one, that where one of two innocent persons must suffer the loss should fall upon him who has suffered a negotiable security, with his name attached to it, to get into circulation, and thereby mislead the indorsee. Such rules, and such an application of them, are necessary to give security to negotiable paper.

The defendant's counsel claim that the same rule that would hold the maker of a note, who signed it under duress, to pay it to the innocent holder, for value, would hold infants, and others who are incompetent to contract, to pay their notes when thus held; but this is neither a legal nor a logical sequence. The infant belongs to a class, all of whom are held by law to be incompetent to bind themselves by their contracts. In the other case, the man belongs to a class amply competent to contract, is under no general disability as the infant is, is never to be presumed to have signed any note under duress, because that is a condition never to be presumed in case of a free man, who may have signed a thousand notes and never have signed but this one under duress. Is suspicion to be cast upon all notes that are known to be properly signed, and against men under no disability, simply because it is possible that such a note may be obtained by duress or fraud?

Take also the case of a slave. There the general rule is that he is incompetent to contract; and if a man were about to purchase a note, and, upon inquiry as to who the signer was, should learn that he was a slave, that would be sufficient notice to him that the note was void, because all contracts made by all slaves usually are so, because while in that condition they must necessarily be constantly under duress of body, mind and will. But when it is ascertained that the signer is a free man, then the presumption is that he is never under duress, and there are only rare exceptions to this general rule; and to say that in such exceptional cases the maker shall be allowed to stand upon such a defense against an innocent holder for value, taking it in the ordinary course of mercantile business before the maturity of the note, would be to overthrow all confidence in negotiable paper, and entirely reverse the policy of the whole system of mercantile law. The exception to the ruling of the court upon this point must be sustained; but we shall find that the numerous authorities which bear upon the next question to be considered have also a direct bearing upon this point.

II. Next let us inquire, upon whom is the burden of proof, after duress, or fraud, or illegality of consideration is proved? Must the defendant not only prove that he had a perfect defense to the note

originally, but also show that the indorsee had notice of the defect, or that he paid no consideration for it, or that he is not in some way the bona fide holder of the note? Or must the plaintiff, after such defense to the original contract is proved, assume the burden of proving that he is a bona fide holder, for a valuable consideration, without notice of any defect, and that it came seasonably into his hands?

In Collins v. Martin, 1 B. & P. 651, Eyre, C. J., says: "No want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between an acceptor or drawer and a third person holding the bill for value; and the rule is so strict that it will be presumed that he does hold for value till the contrary appears. The onus probandi lies on the defendant." This case is cited approvingly in Doe v. Burnham, 31 N. H. 432, though the question we are now considering was not there raised. But the case of Collins v. Martin goes further than this, and holds that where the defendant has first proved that the note or acceptance had been obtained by felony, by fraud, or by duress, that so far tended to throw suspicion upon the indorsement as to call on the plaintiff, the indorsee, to prove that he paid value for it.

This is unquestionably the correct rule, as also stated by Parker, J., in Heath v. Sansom, 2 B. & Ad. 291, although the majority of the court in that case came to a somewhat different conclusion, and held that "in all cases where, from defect of consideration, the original payees cannot recover upon the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself, or a prior indorsee." The same doctrine is held in Brown v. Philpot, 2 M. & Rob. 285.

But these decisions were soon overruled, so far as a mere want or failure of consideration was concerned.

In Bailey v. Bidwell, 13 M. & W. 73, it was held by the Court of Exchequer that if, to an action on a bill or note, the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, the illegality being proved, the onus is cast upon the plaintiff of proving that he gave value. The reason of the rule is there stated by Parke, B., who says: "It certainly has been, since the later cases, the universal understanding that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a bona fide indorsee for value." Alderson, B., adds: "It appears to me that, though the defendant is bound to aver in his plea both the illegality and want of consideration, yet if he proves the illegality, and the plaintiff does not prove the giving of the consideration, the plea is maintained."

And in Smith v. Braine, in the Queen's Bench, 3 E. L. & E. 379, Campbell, C. J., says: "But since the new rules, judges have, with entire approbation, directed juries that where the bill was illegal in its

inception, or where the immediate indorser to the plaintiff obtained possession of it by fraud, the want of consideration as between him and the plaintiff may be presumed."

In Duncan v. Scott, 1 Camp. 100, which was an action by the indorsee against the drawer of a bill, the defendant had given the bill without consideration, and while under duress. Lord Ellenborough held that, upon these facts being proved by the defendant, the plaintiff must prove that he gave value for it before he could recover, even though it was indorsed to him before it became due.

Rees v. Headfort, 2 Camp. 574, was an action by an indorsee against the acceptor of a bill. The drawer had received no consideration, but had been tricked out of the bill by a gross fraud. Upon proof of these facts by the defendant, Lord Ellenborough held that it was incumbent on the plaintiff to show some consideration paid for the bill; and, not doing so, he was nonsuited.

Bayley, in his work on Bills (page 372), says: "In many cases the plaintiff is compellable to prove that either he, or some preceding party, took the note bona fide, or for value—as in case of a bill or note originally given without consideration, and while the person giving it was under duress, or in case of a bill or note obtained by fraud, or in case of a delivery by a person not entitled to make it, as in the instance of bills or notes that have been stolen or lost."

In Mills v. Barber, 1 M. & W. 425, Lord Abinger, C. B., says: "Where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill; but if the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, or that it has been clandestinely taken away, or has been lost or stolen, the holder will be required to show that he gave value for it." And (page 432) "if, in an action by an indorsee against the acceptor of a bill, the ground of defense be that the bill was obtained illegally from the defendant, and indorsed to the plaintiff without consideration, the defendant will be bound in his plea to aver both the illegality and the want of consideration; and if, at the trial, he proves the illegality, such proof will, according to the rule above stated, throw upon the plaintiff the onus of showing that he gave consideration for the bill." The same doctrine is held in Bingham v. Stanley, 2 A. & E. (N. S.) 117; Berry v. Alderman, 24 E. L. & E. 318.

In De La Chaumette v. Bank of England, 9 B. & C. 208, where the defendant had proved that the bill was stolen, it was held that it was incumbent on the plaintiff to show that the foreign merchant, who assigned it to him, gave full value for it.

In Harvey v. Towers, 4 E. L. & E. 551, 6 Exch. 656, Pollock, C. B., says: "This is an action on a bill of exchange, with a plea of fraud, which, according to the ordinary course of pleading, contains an allegation not merely of the fraud in obtaining the bill, but that the plain-

tiff gave no consideration for it. In point of law, that last allegation was necessary to make the plea a perfect answer to the action; for though a bill of exchange may have been originally concocted in fraud, or obtained by fraud, though it may have been stolen, or a party may have been swindled out of it, this is no defense to an action by the holder unless he has obtained it without giving value, and he may sue on it notwithstanding such defect in the title of some one else." He also holds that proof of fraud alone, by the defendant, is a sufficient sustaining of this plea to throw upon the plaintiff the burden of proving consideration; and where there is evidence of fraud for a jury, the judge should call on the plaintiff for such proof, with instructions to the jury that, if they find the fact of fraud proved, the plaintiff must satisfy them that he gave consideration for the bill.

In accordance with the doctrine of these cases last cited is Greenleaf on Evidence (section 172), where it is said: "In an action by the indorsee against the original party to the bill, if it is shown on the part of the defendant that the bill was made under duress, or that he was defrauded of it, or if a strong suspicion of fraud be raised, the plaintiff will then be required to show under what circumstances and for what value he became the holder. It is, however, only in such cases that this proof will be demanded of the holder. It will not be required where the defendant shows nothing more than a mere absence or want of consideration on his part." See also Bramah v. Roberts, 1 Bing. N. C. 469; Low v. Chifney, 1 Bing. N. C. 267.

So in 2 Phill. Ev. (4 C. & H.) 8, it is said that in some cases the plaintiff, in an action upon a bill of exchange or promissory note, must prove that he or some preceding party took the bill or note bona fide, and for value, as where bills or notes have been obtained by fraud, or under duress, or have been stolen or lost. When the plaintiff has established a prima facie case, it then remains for the defendant, if he can, to impeach his title; and until he has first cast some suspicion on the title by showing that the note was lost, or obtained by force or fraud, he cannot cast the burden of proof upon the plaintiff. See, also, Heyden v. Thompson, 1 A. & E. 210; 1 Saund. on Pl. & Ev. 304, 305; Ch. on Bills, 79; Bayley on Bills, 500.

And in Smith's Mercantile Law, 320, it is said that the defenses of duress, fraud, etc., will not prevail against a bona fide holder.

The same doctrines very generally prevail in this country, wherever the subject has received judicial consideration. Munroe v. Cooper, 5 Pick. (Mass.) 412; Woodhull v. Holmes, 10 Johns. (N. Y.) 231; Vallett v. Parker, 6 Wend. (N. Y.) 615; Small v. Smith, 1 Denio (N. Y.) 583; Worcester County Bank v. D. & M. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; Wyer v. D. & M. Bank, 11 Cush. (Mass.) 52, 59 Am. Dec. 137; Rockwell v. Charles, 2 Hill (N. Y.) 499; Bissell v. Morgan, 11 Cush. (Mass.) 198; Crosby v. Grant, 36 N. H. 273. So in Smith on Cont. (3d Am. Ed.) 277 (*187), in a note by Rawle, it is said that in New York it has been held that, as soon as the defend-

ant shows there has been usury between the prior parties, he casts on the plaintiff the burden of proving that he is a holder for value, as is the case in every instance where fraud, duress, or illegality is shown between the prior parties.

These authorities would seem conclusive that the plaintiff's exception —that the evidence offered would have been no defense unless it were proved that he was not the bona fide holder—must be overruled. When the defendant had proved the duress, he had made a good defense as against the original party; and because of the legal presumption that in such cases the payee, being guilty of such illegality, would dispose of the note and place it in the hands of some other person to sue upon it (Bailey v. Bidwell, supra), he had thereby cast a suspicion on the plaintiff's title, which threw the burden upon him of showing affirmatively that he was a bona fide holder for value. Nor can we see that the fact that this evidence was offered under the general issue alters the position of the parties or the state of the case.

These authorities also bear directly upon the first point taken by the defendant that duress is a defense against any holder, however innocent he may be, and however valuable a consideration he may have paid for the note; and if other authorities on this point were needed they are not wanting. In Powers v. Ball, 27 Vt. 662, Redfield, C. J., says: "Illegality, duress, fraud, and want or failure of consideration are no defenses as against a bona fide holder for value." See, also, St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295; Ellicott v. Martin, 6 Md. 509, 61 Am. Dec. 327; Minell v. Reed, 26 Ala. 730; Norris v. Langley, 19 N. H. 423; Knight v. Pugh, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99.

The verdict must be set aside, and a new trial granted.[54]

In re EUROPEAN BANK.

Ex parte ORIENTAL COMMERCIAL BANK.

(Court of Appeal in Chancery, 1870. L. R. 5 Ch. App. 358.)

This was an appeal from an order of Vice Chancellor Malins dismissing a summons taken out by the Oriental Commercial Bank with reference to certain bills drawn on and accepted by the European Bank, which was now in course of winding up, but able to pay its debts in full. The Eastern Commercial Bank were the holders of the bills, but the Oriental Commercial Bank claimed the proceeds on the ground that the bills were bought with their moneys by one Demetrio Pappa, that the Eastern Commercial Bank had notice of this through Deme-

[54] A note delivered by an infant to the payee for necessaries is unenforceable in the hands of an indorsee, and semble, in the hands of the payee. In re Soltykoff, [1891] 1 Q. B. 413.

trio Pappa, and that, whether they had notice or not, they could stand in no better position than Demetrio Pappa would have stood if he had not parted with the bills, because they were overdue when he transferred them.

The bills in question were bought by Demetrio Pappa on the 21st of March, 1867, for 15s. 4d. in the pound. They were at that time overdue. Demetrio Pappa had an account with the National Bank of Scotland in the name of George John Pappa, a relation of his, which account, in his affidavits, he alleged to be his own. On the 19th of March, 1867, a sum of £2,594. 6s. 1d. was paid into this account, and on the 21st of March a sum of £2,300. was drawn out and applied in the purchase of the bills in question, along with bills of the Oriental Commercial Bank for £2,000.

In 1866, after a petition, upon which an order for winding up the Oriental Commercial Bank was afterwards made, had been presented, D. Pappa, who was the manager of the bank, sent out G. J. Pappa to Patras, as he alleged, on his private business, but, as he admitted, with instructions also to receive the debts due to the bank and to settle its debts. He denied that the bills of the European Bank were purchased with moneys of the Oriental Commercial Bank collected abroad by G. J. Pappa, and the Vice Chancellor, upon the evidence before him, considered that, although there was great reason to suspect that D. Pappa had made the purchase with assets of the Oriental Commercial Bank, it was not proved with sufficient distinctness that he had done so, and that the case of the applicants therefore failed.

On the appeal motion the Oriental Commercial Bank adduced fresh evidence which proved most indisputably that the £2,594. 6s. 1d. paid into the account of G. J. Pappa on the 20th of March, 1867, was made up of two sums of £2,094. 6s. 1d. and £500., and that the larger of these two sums arose from assets of the Oriental Commercial Bank which G. J. Pappa had collected abroad, and had handed over to D. Pappa on his return.

The Eastern Commercial Bank was a limited company, of which Demetrio Pappa was the promoter. It was registered on the 4th of April, 1867, under a memorandum of association dated the 2d of April, and articles dated the 4th of April, in that year. Pappa was the managing director, and until July, 1867, he was the only director. He sold the bills in question to the Eastern Commercial Bank on the 6th of April, 1867, at 16s. in the pound, and paid himself for them by a check which he, as managing director, drew on the funds of that company.

Mr. Jackson and Mr. W. W. Karslake, for the Oriental Commercial Bank, in support of the appeal motion.[55]

Mr. Pearson, Q. C., and Mr. Locock Webb, for the Eastern Commercial Bank, were desired by the court to confine themselves to the question as to the bills being overdue when they were purchased.

[55] Their argument is omitted.

No doubt the indorsee of an overdue bill takes it subject to its equities, but they must be equities attaching to the bill, equities between the holder and the drawer or acceptor. No other equity is recognized. This is the result of the cases which are collected in Ex parte Swan; and Charles v. Marsden, 1 Taunt. 224, contains strong dicta showing that the equity goes no further.

Lord Justice GIFFARD. Why is not an equity between the indorser and a third party to be enforced?

The law, we submit, is that it is not to be enforced, nor is it expedient that it should.

Mr. W. W. Karslake, in reply.

Sir G. M. GIFFARD, L. J., after stating the facts and reviewing the evidence, continued:

I have read the evidence at some length in consequence of the nature of the charge, and I do not hesitate to say that it is proved to demonstration that the £2,094. 6s. 1d. was the amount arising from the discount of bills belonging to the Oriental Commercial Bank, and that this, with a sum of £500., forms the sum which appears in the trust account under date of the 19th of March as a sum of £2,594. 6s. 1d., and that the sum of £2,300. under date the 21st of March, on the other side of the account, was drawn out and applied in the purchase of the bills from Melas Bros., of which the bills in question, amounting in all to £1,000., formed part, the rest being bills for £2,000. on the Oriental Commercial Bank. To speak plainly, and in such a case there ought to be plain speaking, Demetrio Pappa has sworn that which is not true, and has applied to his own purposes the moneys arising from the discount of bills, which bills, he knew, belonged to the Oriental Commercial Bank. A grosser fraud there cannot be. Now at all events the facts have been proved, and it remains to be seen what the law is as applicable to these facts. The bills and moneys belonging to the Oriental Commercial Bank were not received either by George John Pappa or Demetrio until after the presentation of the petition for winding up that bank. Therefore no question of account as between the bank and Demetrio Pappa arises. The £237. paid over by John George Pappa to the liquidator has nothing to do with this matter. It is in no way concluded by any receipt given by or settlement of accounts with the official liquidator; and if the bills in question were now in the hands of Demetrio Pappa, beyond all question the Oriental Commercial Bank could follow their moneys into them, and assert a right to a proportional part of the proceeds. Is, then, the Eastern Commercial Bank in any better position than Demetrio Pappa would have been? In my opinion they were not affected with notice through Demetrio Pappa. He purchased the bills before the Eastern Commercial Bank was formed. He stood in the relation of vendor to that bank, and though he was managing director and something more, and paid himself by check, he is not in the position of a partner in an ordinary firm, but of agent acting for the bank as principal. He cannot be taken

to have disclosed his own fraud. Kennedy v. Green, 3 My. & K. 699, therefore applies.

But the want of notice is not conclusive on the case. The bills were overdue when the Eastern Commercial Bank took them, there were equities affecting the bills, and the Eastern Commercial Bank has no better title, either legal or equitable, than Demetrio Pappa had. The law on this subject cannot be better stated than is done by Vice Chancellor Malins in his judgment in Ex parte Swan, Law Rep. 6 Eq. 359, 360.

In this case there is an equity attaching directly to the bills. The result therefore is that the Oriental Commercial Bank can follow their moneys into the bills in the possession of the Eastern Commercial Bank, precisely in the same way as though Demetrio Pappa had not parted with them. I have not calculated the exact amount which was applied in payment of these bills, but as the amount applied in payment of them and the other bills was £2,300., and the £2,300. was drawn against a sum of £2,594. 6s. 1d., which was made up of a sum of £2,094. 6s. 1d. belonging to the Oriental Commercial Bank and of £500. belonging to Demetrio Pappa, and it must be taken, according to the case of Pennell v. Deffell, 4 D., M. & G. 372, that these two sums contributed ratably, it will follow that the Oriental Commercial Bank is entitled to so much of the proceeds of the bills as is represented by their proportion of the purchase money, and the Eastern Commercial Bank to so much as is represented by the £500. The proportion will be somewhere about four-fifths and a fraction, and a fraction less than one-fifth. There will be a declaration to this effect and payment accordingly. The amounts can be calculated. As regards costs, the European Bank are in the position of plaintiffs in an interpleader suit, and must have them both here and below out of the fund. The other parties must bear their own costs. The Oriental Commercial Bank have failed in part, that is as regards the £500., and they completed their case by evidence which was not before the Vice Chancellor. The practice of the court admits of the introduction of new evidence on an appeal motion; but where there is an incomplete case in the court below, and a complete one only on the appeal, I shall as a general rule adopt the course of refusing to give any costs.

The order of the Vice Chancellor will be discharged, and the order I have suggested substituted for it. If the additional evidence had been before him, I gather from his judgment that his order would have been the same as that which I now make.[56]

[56] See Alcock v. Smith, [1892] 1 Ch. 238.

HILL v. SHIELDS.

(Supreme Court of North Carolina, 1879. 81 N. C. 250, 31 Am. Rep. 499.)

The facts appear in the opinion. There was a verdict and judgment for plaintiff, and defendant appeals.[57]

DILLARD, J. From the case of appeal sent up to this court the case is that defendant was payee in a promissory note executed to him by Edward Anderson, payable at 12 months for a large sum of money and secured by a mortgage on property, and on the 23d day of January, 1875, after its dishonor, he transferred the same by a blank indorsement thereon to the Mercantile Bank of Norfolk, which carried with it the mortgage as an incident, and the bank afterwards transferred the same to the present plaintiff by delivery for full value. After receiving several payments on the note and realizing all the proceeds of the property conveyed in the mortgage, there still remained a balance unpaid on the note and for that this action was brought.

On the trial in the court below the plaintiff tendered the issue: "Was the plaintiff a bona fide purchaser of said note for full value and without notice?" Defendant admitted the affirmative of that issue and tendered on his own behalf the following issues:

1. Did defendant and the bank, when the former indorsed the note in blank, agree that defendant was not to be held responsible on his indorsement?

2. Did any consideration pass from the bank to defendant for his indorsement?

The plaintiff objected to said issues upon the ground that an affirmative response thereto could in no way affect the liability of the defendant to the plaintiff, who was admitted to be a remote indorsee for full value and without notice; and his honor, being of opinion with the plaintiff on the objection, refused to submit the said issues, and thereupon pronounced judgment, upon said admission of defendant and other facts not denied in the pleadings, for the plaintiff for the unpaid balance of his debt from which judgment the appeal is taken.

The question presented by the appeal for our determination is: Does the plaintiff, a remote indorsee of defendant's note put into circulation past due, hold the same subject to the special agreement of defendant with the Mercantile Bank, his immediate indorsee, not to hold him responsible on his indorsement? the plaintiff being a purchaser for full value, and without notice of the alleged special agreement.

We concur in the opinion of his honor that the plaintiff held the legal title to the note, unaffected by the special agreement between the defendant and the bank, supposing such agreement to have been made.

A promissory note, by the statute of 3 & 4 Anne in England and by statute in this state, is made negotiable as inland bills of exchange,

[57] The arguments of counsel are omitted.

and the legal title may be passed by indorsement thereon in full or in blank, absolute or restricted, in honor or dishonor, with incidents however to the holder and to the parties to the note raised by the fact of its being made before or after its maturity. If acquired before due, by the law merchant, the holder takes the title clear of all objections; but if after, he is put on inquiry and is held to take subject to all equities and legal defenses of the maker at the date of the transfer or before notice thereof against the payee under the English law, but against the payee and all intermediate holders under our Code as decided in the case of Harris v. Burwell, 65 N. C. 584.

This liability of the holder of overdue paper to equities and legal exceptions extends only to those that the maker has, as explained above, but does not apply as between the holder and others taking before him by indorsement, except between the holder and his immediate indorser. There is no adverse presumption from the paper being in dishonor as between successive indorsers, as there is between the holder and the maker. Each indorser, including the payee, down the line, has and passes the legal title, and his indorsement in legal import is a contract with his indorsee, and all subsequent holders by indorsement, that the maker will pay the note, or on notice he will. Parker v. Stallings, Phill. L. 590; National Bank of Washington v. Texas, 20 Wall. 89, 22 L. Ed. 295 (Swayne's opinion).

Here the defendant put the paper overdue afloat with his name merely written on the back, and that in legal effect passed the title to the Mercantile Bank and gave it the unqualified power of disposing of the same, and imported a promise to the bank, and not only to it, but to the plaintiff, a subsequent indorsee, that the maker would pay the note, and if he did not that he (the defendant) would. 2 Parsons on Bills, 23. The indorsement being in blank, and the contract implied by law with his indorsee and subsequent holders giving such unqualified power as we have seen, it has been much debated and variously decided as to the competency of the indorser by parol proof to rebut the implication of the law and to annex a qualification when none is expressed.

It is settled in this state, however, that parol testimony may be adduced under a blank indorsement to annex a qualification or special contract as between the immediate parties. Davis v. Morgan, 64 N. C. 570; Mendenhall v. Davis, 72 N. C. 150. But between indorser in blank and remote parties without notice, the weight of authority is that parol proof is inadmissible and the contract implied by law stands absolute. 2 Parsons, 23; Hill v. Ely, 5 Serg. & R. 363, 9 Am. Dec. 376; 1 Daniel on Neg. Inst. §§ 699 and 719.

In treating of this subject, Daniel, in his work on Negotiable Instruments, says a parol agreement in the indorsement of a note to the effect that the transfer should be without recourse on the indorser cannot be interposed as a defense against a subsequent bona fide holder without notice; nor would the case be varied by the fact that the trans-

fer was to such a holder by delivery and that he declared on the prior indorsement as though made to him. 1 Daniel, Neg. Inst. § 699.

It appears in the case that the plaintiff purchased the notes of the Mercantile Bank, and it is admitted by defendant it was for full value and without notice of the special agreement between him and the bank as to his alleged nonresponsibility; and the defendant having by this act put it into the power of his immediate indorsee to circulate the paper to the plaintiff upon the faith of an absolute responsibility on his part as imported by his indorsement, ought not to be allowed, in our opinion, by parol to vary the legal effect of his indorsement as against this plaintiff. To this extent the principle decided in Parker v. Stallings, supra, goes. There the payee indorsed to his attorney for collection merely, but not so expressed in the terms of the indorsement, and the attorney indorsed to a stranger for value and without notice of the special purpose of the indorsement, and the indorser sought to escape liability to the holder by proof of the circumstances of the indorsement, and the court in the course of their opinion say: The payor, "who puts a note in circulation, ought no more to be protected from the claim of a subsequent bona fide purchaser for value than would be the indorser of a bill of exchange not yet due as against an innocent holder for value." And they further say: Promissory notes overdue being by law assignable, "the unchecked circulation of them must be upheld by the same principles as are applied to bills of exchange."

It seems to us, therefore, that the defendant, having indorsed the note in blank, and thereby put it into the power of his indorsee to impose on the plaintiff by relying on the legal import of the indorsement, ought not to be allowed as against the plaintiff, a purchaser for value and without notice, to make proof of the alleged special agreement, and in that aspect of the case it was immaterial to have any response by the jury to the issues tendered by the defendant.

No error.[58]

GEO. ALEXANDER & CO. v. HAZELRIGG.

(Court of Appeals of Kentucky, 1906. 123 Ky. 677, 97 S. W. 353.)

This action was instituted by appellant, doing business as Geo. Alexander & Co., against the appellee, upon the following promissory note: "$1,592.90. Mt. Sterling, Ky., Sept. 14th, 1904. Sixty days after date, we jointly and severally promise to pay to Desha Lucas, or order, fifteen hundred and ninety-two and $^{90}/_{100}$ dollars, negotiable and payable at the Montgomery National Bank, Mt. Sterling, Ky., value received, with interest at 6 per cent. per annum. [Signed] John W.

[58] To the same effect, see Crosby v. Tanner, 40 Iowa, 136 (1874); Hibernian Bank v. Everman, 52 Miss. 500 (1876); Etheridge v. Gallagher, 55 Miss. 458 (1877); Reardan v. Cockrell, 54 Wash. 400, 103 Pac. 457 (1909).

Hazelrigg." From a judgment in favor of defendant, plaintiff appeals.[59]

NUNN, J. The real question to be determined is whether a negotiable note executed for money lost on a bet or wager can be successfully defended, when owned and held by an innocent purchaser for value without notice of the infirmity or illegal consideration of the note. As we understand the appellant's petition, he concedes that prior to the passage and the taking effect of the negotiable instrument act, referred to, such a note could be successfully defended in the hands of an innocent purchaser; but since that act took effect he contends that all laws inconsistent with that act stood repealed. He claims that under section 57 the question of consideration cannot be inquired into as against the holder in due course. He takes the paper free from defenses. And in support of this position we are referred to the case of Wirt v. Stubblefield, 17 App. D. C. 283. In that case it was held that the section, the same as section 57 referred to above, changed the law of the District of Columbia as to a note given for a gambling debt in the hands of a holder in due course; the court saying: "We know, moreover, that the great and leading object of the act, not only with Congress, but with the larger number of the principal states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have hitherto prevailed. The great object sought to be accomplished by the enactment of the statute is to free the negotiable instrument as far as possible from all latent local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute."

It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the Legislature has for many years deemed to be sound public policy. It is inconceivable that the General Assembly, in the passage of the act of 1904 for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void. In our opinion, the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts. Mr. Daniel, in his work on Negotiable

[59] The statement of the case is taken from the opinion of the court. Part of the opinion is omitted.

Instruments (section 197), says: "The bona fide holder for value, who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed mala in se, and those founded in positive statutory prohibition, which are termed mala prohibita. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having a bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule —that when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it."

In the case of Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, reported in 10 Am. St. Rep., at page 23, the court said: "In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as plaintiffs are conceded to be, it is essential that a statute should be shown governing the case, which in direct terms declares that transactions such as those here involved are unlawful, and that notes given under circumstances exhibited by the facts in this case are absolutely void. The principle may be considered as well established that when a statute in express terms pronounces contracts, bills, securities, and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authorities." And the authorities are referred to, and the court continues: "In such a case, the note will be declared void in the hands of an innocent holder."

In the case of Bohon's Assignees v. Brown, etc., 101 Ky. 355, 41 S. W. 275, 38 L. R. A. 503, 72 Am. St. Rep. 420, the court said: "In the case of Cochran v. German Insurance Bank, 9 Ky. Law Rep. 196, the superior court held that 'a bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder.' And in the case of Farmers' & Drovers' Bank of Louisville v. Unser, 13 Ky. Law Rep. 966, the court says: 'The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the Legislature that such an illegality makes the contract void.' "

For these reasons, the judgment of the lower court is affirmed.[60]

[60] Accord: Lawson v. Bank, 102 S. W. 324, 31 Ky. Law Rep. 318 (1907), semble, statutory defense; McAfee v. Bank, 104 S. W. 287, 31 Ky. Law Rep.

MARLING v. JONES et al.

(Supreme Court of Wisconsin, 1909. 138 Wis. 82, 119 N. W. 931.)

Appeal from a judgment dismissing plaintiff's complaint. The action was against Jones as maker of a note, which he had made for the accommodation of Herman. After maturity Herman negotiated the note to the plaintiff, who paid value for it.[61]

TIMLIN, J. * * * Was the action properly dismissed as to Jones? No consideration moving to the accommodation maker is necessary to uphold an accommodation note. The very name of the paper suggests this. The consideration in such case which supports the promise of the accommodation maker is that parted with by the person taking the accommodation note and received by the person accommodated. Nor is it any defense by the maker of an accommodation note that the taker other than the person accommodated, whether indorsee or transferee for value, knew before and when he took the note that the accommodation maker received no consideration. This would be merely showing that such taker, indorsee, or transferee knew that it was an accommodation note. If this were sufficient to defeat the note, there could be no such thing as accommodation paper, except in cases of ignorance, of this fact on the part of the taker, indorsee, or transferee, and this would be contrary to common experience, and avoid many of the daily transactions in banking and other branches of business. Section 1675—55, vol. 3, Sanborn's St. Supp. 1906. But the accommodation note in question was transferred by the party accommodated, namely, the payee therein, after it became due.

Does this circumstance permit the accommodation maker to avoid the note on the ground that he received no consideration? If the effect of a transfer, after due, is merely to leave the transferee subject to notice or knowledge of the true circumstances attending the execution of the note in question, and for this reason subject him to defenses, then, as actual knowledge that the note was accommodation paper would be no defense by the accommodation maker as against the transferee for value from the party accommodated, it would seem that it could make no difference in the liability of the accommodation maker upon this

883 (1907), statutory defense; Stickland v. Henry, 66 App. Div. 23, 73 N. Y. Supp. 12 (1901), usury.

See, also, dissenting opinion of Cullen, C. J., in Schlesinger v. Gilhooly, 189 N. Y. 1 (1907), usury.

Contra: Wirt v. Stubblefield, 17 App. D. C. 283 (1900), wager; Arnd v. Sjoblom, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842 (1907), statutory defense; Klar v. Kostiuk, 65 Misc. Rep. 199, 119 N. Y. Supp. 683 (1909), usury; Schlesinger v. Gilhooly, supra, semble, usury; Schlesinger v. Kelly, 114 App. Div. 546, 99 N. Y. Supp. 1083 (1908), semble, usury; Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 69, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591 (1908), semble, usury; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93 (1905), semble, usury.

[61] The statement of facts is abridged from the opinion. Part of the case relating to a mortgage given to secure the note is omitted.

ground whether the note was transferred before or after due. Aside from this imputed notice or knowledge, or actual notice or knowledge, it is not true that the taker for value from the party accommodated stands in the shoes of the latter. The difference between them is that one has parted with value for the note and the other has not. In neither case has the maker received a consideration moving to him. So that between the party accommodated and the accommodation maker there is no consideration parted with or received by either, while between the transferee for value and the accommodation maker there is a consideration moving from the former at the instance of the latter sufficient to support the contract. There is considerable conflict among the decisions on this point, and those text-writers who profess to have made a thorough examination of the cases seem to incline to the belief that the weight of authority upholds the view that the transferee of accommodation paper after due may enforce the same against the accommodation maker. Joyce, Defenses to Com. Paper, § 282 (A. D. 1907); 1 Dan. Neg. Inst. (5th Ed.) § 726 (A. D. 1903); 2 Randolph, Com. Paper (2d Ed.) § 677 (A. D. 1899); Story, Prom. Notes (7th Ed.) § 194 (A. D. 1878); 2 Parsons, Notes and Bills, p. 29 (A. D. 1865); Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109; Black v. Tarbell, 89 Wis. 390, 61 N. W. 1106; 1 Am. & Eng. Ency. Law (2d Ed.) 364.

The uniform Negotiable Instrument Law (Sanborn's St. Supp. 1906, §§ 1675 to 1684—7) enacted by the Legislature of this state, and in like manner adopted by 34 states of the Union, and by Congress for the District of Columbia, in the effort to bring about more uniformity of decision regarding these instruments of commerce, appears to distinguish between a holder for value and a holder in due course. Brannan, Neg. Inst. Law (A. D. 1908); Bunker, Neg. Inst. Law (A. D. 1905). Section 1675—55, Sanborn's St. Supp. 1906, defines who is an accommodation party, and provides that such party is liable on an instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Section 1675, Sanborn's St. Supp. 1906, defines "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "value" to mean a valuable consideration. On the other hand, a holder in due course is defined in section 1676—22, Sanborn's St. Supp. 1906, to be one who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; (5) that he took it in the usual course of business.

In the hands of a holder otherwise than in due course such note is subject to the same defenses as if the notes were not negotiable. Sec-

tion 1676—28, Sanborn's St. Supp. 1906. A negotiable instrument is discharged by the payment in due course by the party accommodated. It is not discharged by payment by a party secondarily liable thereon, but remits such party to his rights against him primarily liable (section 1679—2, Sanborn's St. Supp. 1906), except where it is made for accommodation and paid by the party accommodated (Id.). On the other hand, there are the cases of Chester v. Dorr, 41 N. Y. 279, Peale v. Addicks, 174 Pa. 513, 34 Atl. 201, Bacon v. Harris, 15 R. I. 599, 10 Atl. 647, Battle v. Weems, 44 Ala. 105, and Simons v. Morris, 53 Mich. 155, 18 N. W. 625. See, however, in Alabama the later case of Connerly v. Planters' & M. Ins. Co., 66 Ala. 432; in Michigan the later case of Warder B. & G. Co. v. Gibbs, 92 Mich. 29, 52 N. W. 73.

No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases where the note is fair on its face and negotiated in due course before due to a purchaser for value, without notice or knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated. But the fact that the accommodation maker received no consideration is not one of these defenses, so long as the note was negotiated by his express or implied authority. The fact is here established that this note was in its inception accommodation paper. Jones made to Herman no express restriction upon its use for that purpose. We do not overlook the testimony of Brand with reference to conversations between him and Herman not in behalf of Jones, which the court below from its findings must have rejected as incredible. We approve this rejection. The testimony is overborne by the circumstantial evidence. It is a question upon which the precedents are at some variance whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. The greater number of courts seem to favor the view that the agency to negotiate an accommodation paper and raise money thereon is not so limited. See citations supra.

The courts of this state are not yet committed upon the question presented, and it seems more in harmony with the uniform negotiable instrument law, and with the weight of judicial authority, to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note, and without consideration moving to the accommodation maker. This necessitates a modification of the judgment of the court below so as to permit the appellant to take judgment against the accommodation maker, Jones. * * *[62]

[62] Accord: First Bank v. Grant, 71 Me. 374, 36 Am. Rep. 334 (1880); Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109 (1905). Contra: Chester v. Dorr, 41 N. Y. 279 (1869); Sears v. Moore, 171 Mass. 514, 50 N. E. 1027 (1898). "The court are unanimously of opinion in this case—and after some little

PART III

LIABILITY OF PARTIES

CHAPTER I

MAKER AND ACCEPTOR

RUMBALL v. BALL.

(Court of Queen's Bench, 1711. 10 Mod. 39.)

Action of debt upon a note to this effect: "I acknowledge myself indebted to such a one so much, which I promise to pay upon demand."

It was moved in arrest of judgment, that though upon a note acknowledging a debt it was not necessary to allege a demand, yet where it is part of the agreement there a demand is necessary.

But THE COURT was of another opinion, for it is a debt in presenti and the words "promise to pay" import no more than that I am ready to pay the money at any time, and shall not restrain or qualify the other words, this being no debt arising upon the performance of a certain condition, but a debt plainly precedent to the demand. Besides, supposing the demand necessary, the action itself, perhaps, is a demand.[1]

doubt at first entertained by one of its members—that there should be a venire de novo. The case mainly relied on for the defendant in error was that of Charles v. Marsden, 1 Taunt. 224, where it was held that it is not a defense to an action by the indorsee of a bill of exchange to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due. But in that case the question arose upon the pleadings; whereas, here it is presented upon the evidence. And we think that, under the circumstances stated in this bill of exceptions, there was evidence for the jury of an engagement on the part of Allen not to negotiate the bill mentioned in the second count after it became due. Therefore, without going further into the case, it is enough to say that there must be a venire de novo." Parr v. Jewell, 16 C. B. 684, 712 (1855). Compare Redfern v. Rosenthal, 86 L. T. R. 855 (1902).

[1] "There is no divided opinion, here or in England, that upon such a note, with or without interest, an action may be maintained against the maker without any demand because it is due. No demand can be sued before due; no action will lie upon any claim of any description arising upon contract before it is due. To say that the suit is the demand is to repeat an unmeaning phrase as thus used, which no number of repetitions can make sensible. A demand note is due forthwith, and hence may be sued without demand." Peckham, J., in Wheeler v. Warner, 47 N. Y. 519, 520, 7 Am. Rep. 478 (1872).

Accord: Church v. Stevens, 56 Misc. Rep. 572, 107 N. Y. Supp. 310 (1907).

HOLMES v. KERRISON.

(Court of Common Pleas, 1810. 2 Taunt. 323.)

This was an action directed by the Court of Chancery. The defendant was a banker at Norwich and had failed. The plaintiff had some years since deposited money with him, for which she held his promissory notes payable at a certain number of days after sight, and bearing 3 per cent. interest. Upon these notes the action was brought, and the defendant pleaded the statute of limitations. Upon the trial of this cause at Guildhall, at the sittings after last Hilary term, before Mansfield, C. J., the defendant insisted on the statute, but offered no evidence that the bills had ever been presented for payment six years before the action commenced, and there was on the other hand some evidence that the bills were still unpaid; for the chief clerk of the banking house produced a book containing an account of the notes of this description which had been issued, and such of them as were paid from time to time, were marked in this book as paid, but no such mark stood against the entry of the plaintiff's notes. The jury found a verdict for the plaintiff.

Best, Serjt., now moved for a rule nisi to set aside the verdict and have a new trial.

But THE COURT were clearly of opinion that, since no debt arose upon a bill payable after sight until a presentment for payment, and since there was no evidence that these bills had ever been presented for payment, there was no proof of a complete cause of action at any previous time, from which the statute of limitations could run. They had therefore no doubt upon the question, and refused the rule.[2]

SANDERSON v. BOWES et al.

(Court of King's Bench, 1811. 14 East, 500.)

The plaintiff declared in assumpsit upon a promissory note, as bearer thereof, against the defendants as the makers, and stated in his first count that whereas M. F. (one of the defendants), for himself and the other defendants, heretofore, to wit, on the 1st of September, 1808, at Workington, in the county of Cumberland, to wit, at London, etc., according to the form of the statute, made a certain note in writing commonly called a promissory note, and thereby on demand promised to pay at the banking house there, to wit, at Workington aforesaid, to one R. Nelson or bearer, the sum of £1. 1s. value received; and the plaintiff afterwards, to wit, on the same day and year aforesaid, at

[2] So a bill or note payable at sight required presentment to mature it (Dixon v. Nuttall, 1 Cr., M. & R. 307 [1834]), before St. 34 & 35 Vict. c. 74 (1871), which declared that such instruments should be deemed payable on demand.

London, etc., duly became, and before and at the time of the exhibiting of this bill was and still is, the bearer of the said note, whereof the defendants afterwards, to wit, on the day and year aforesaid, at London, etc., had notice, by reason of which premises, and by force of the statute, etc., the defendants became liable to pay to the plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note. And being so liable, the defendants, in consideration thereof, afterwards, to wit, at London, etc., undertook and promised the plaintiff to pay him the said sum of money in the said note specified, according to the tenor and effect of the said note. There were several other counts on similar notes, and also the common counts for money paid, money had and received, and upon an account stated; and then the declaration concluded: Yet the defendants, not regarding their said several promises and undertakings so by them in manner and form aforesaid made, etc., have not yet paid the said several sums of money, etc., to the plaintiff, although often requested: but the defendants to pay the same, or any part thereof, have hitherto altogether refused, and still do refuse, to the damage of the plaintiff of £30., etc. The defendants demurred generally to all the counts on the promissory notes, and pleaded the general issue to the money counts.[3]

Lord ELLENBOROUGH, C. J. This case is materially different from that of Fenton v. Goundry, 13 East, 459, lately decided by this court, which was the case of a bill drawn generally, but accepted payable at a particular place, which special acceptance we considered merely as importing the intention of the party that he would be found when the bill became due at that place as his house of business, where he should be prepared to pay it. There the acceptance payable at the place was no part of the original conformation of the bill itself; but here the words restrictive of payment at the place named are incorporated in the original form of the instrument, which alone creates the contract and duty of the party. This is not like cases cited of duties which are transitory with the person; but here the duty is to be performed, and the money is made payable, at a specific place, viz. the defendants' banking house, at Workington. Under such circumstances a demand there by the holder is a condition precedent, in order to give himself a title to receive the money. Neither is it like the case of bonds with conditions, where the party is originally liable to the sum named in the bond; and he is to found his defense, and relieve himself against the payment of the penalty, by showing performance of the condition. That must come from him by way of defence: but here the defendant's duty was limited by the instrument itself, and nothing was demandable of him but upon the instrument. If the action for money lent, or money had and received, would lie merely upon the evidence

[3] The arguments of counsel, and the opinions of Grose and Le Blanc, JJ., are omitted.

of the note in question, let the plaintiff bring such an action; but this action upon the note will not lie, unless the plaintiff has demanded payment at the appointed place. And I cannot but say that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient that the makers of notes of this description should be liable to answer them everywhere, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them. Then if the request at the place be a condition precedent, it should have been averred, and for want of such an averment the declaration is bad. But I still think that this is distinguishable from the case of Fenton v. Goundry.

BAYLEY, J. In the case of a bond the defendant is liable to the debt, unless he bring himself within the saving of the condition. It lies therefore upon the defendant in that case to show that he has done all required by the condition in order to excuse himself from the penalty. But in assumpsit upon a contract the plaintiff must show that he has done everything that lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now here the terms of the contract are a promise by the defendants to pay on demand at a certain place. Then the plaintiff must bring himself within those terms, by showing that he made a demand upon the defendants at that place; and the defendants cannot be made liable beyond the terms of their contract, which is to pay at Workington. Where a person contracts generally to pay a sum of money, he is liable to the creditor everywhere; but where a person binds himself even by bond to pay at a particular place, there he is not liable at any other place, and the demand must be made upon him there. So here the defendants, having contracted to pay on demand at a particular place, are not liable but upon a demand at that place.

Judgment for the defendants.

THORPE v. COOMBE.

(Court of King's Bench, 1826. 8 Dowling & R. 347.)

Assumpsit on a promissory note, made by the defendant in the year 1810, "payable two years after demand." Pleas: (1) Non assumpsit; (2) the statute of limitations. At the trial before Abbott, C. J., at the London sittings after last term, it appeared that the note was presented to the defendant, and payment demanded for the first time, on the 18th June, 1823. The defendant said something about interest due on the note, and promised that he would write to his sister, the plaintiff's wife, about it. Other applications were made to the defendant before action brought for payment of the note, but without success. The action was commenced in Michaelmas term last. The jury, under the learned judge's directions, found for the plaintiff.

Scarlett now moved to enter a nonsuit, on the ground that the stat-

ute of limitations was a bar to the action, inasmuch as it must be presumed, after the lapse of 13 years, that payment of the note had been before demanded, and the amount paid. He cited Holmes v. Kerrison, 2 Taunt. 323, and Christie v. Tonseck, M. T. 52 Geo. III, Cor. Sir J. Mansfield cited from M. S. Selw. N. P. 126, Ed. 3.

BAYLEY, J. I am clearly of opinion that the statute of limitations did not begin to run until two years after demand of payment of this note had been made. Here the cause of action did not arise until the two years after demand had elapsed, and consequently the statute affords the defendant no protection. But after the evidence given in this case, there could be no ground for the jury to presume that there had been previous payment or satisfaction of the note.

The other judges concurred.

Rule refused.

HALSTEAD v. SKELTON.

(Court of Exchequer Chamber, 1843. 5 Q. B. 86.)

See, ante, p. 181, for a report of the case.[4]

CALDWELL v. CASSIDY.

(Supreme Court of New York, 1828. 8 Cow. 271.)

On error from the Common Pleas of Albany. Cassidy declared against Caldwell in the court below, as the maker of a promissory note for $70, payable to Cassidy, or order, 60 days after date, at the Franklin Bank in the city of New York. The defendant pleaded that he was, at the time and place of payment mentioned in the note, ready and willing to pay the money, and ever since had been, and now is, ready and willing to pay at the bank, but that the plaintiff never demanded payment, nor presented the note for payment at the bank. On demurrer and joinder, the court gave judgment for the plaintiff below.

SAVAGE, C. J. The question raised by the demurrer has, I apprehend, been already decided by this court. The case of Wolcott v. Van Santvoord, 17 Johns. 248, 8 Am. Dec. 396, contains all the law necessary to its decision. In that case, the declaration was demurred to, because a demand at the place of payment was not averred. Chief Justice Spencer reviewed most of the cases, and discussed the subject with his usual ability. A majority of the court held that such an averment was not necessary, but that if the defendant was ready, at the time and place, to pay the money, that was matter of defense in bar of damages, and might be pleaded by bringing the money into court, the

[4] St. 1 & 2 Geo. IV, c. 78 (1821), was held applicable to bills drawn payable at a particular place, as well as to bills drawn generally and accepted payable at a particular place. Selby v. Eden, 3 Bing. 611 (1826).

See Rowe v. Young, 2 Bro. & B. 165 (1820).

same as a tender. The Chief Justice says: "It is perfectly well settled that when a debt or duty exists, such as the payment of a sum of money, a tender of the money, though it be refused, does not extinguish the debt or duty." So in Fenton v. Goundry, 13 East, 473, Bayley, Justice, says: "If this were to be taken to be a place fixed on by the contract for the payment of the money, and if the defendant had his money there on the day, ready to pay it if demanded, he might have pleaded that he was ready to pay the money at the day and place appointed, and bring the money into court; and that would not be a plea in bar of the action, but in bar only of damages." These remarks were made in an action by the holder of a bill of exchange against the acceptor, where the acceptance specified the place of payment.

There is certainly much confusion in the English cases on this question. In Sanderson v. Bowes, 14 East, 507, Lord Ellenborough takes a distinction between the case of Fenton v. Goundry and the case then before the court, which was a note payable on demand at the Workington Bank. And Bayley, Justice, says: "Where a person contracts generally to pay a sum of money, he is liable to the creditor everywhere; but when a person binds himself, even by bond, to pay at a particular place, then he is not holden at any other place, and the demand must be made upon him there. So here the defendants, having contracted to pay on demand at a particular place, are not liable but upon a demand at that place." In the case of Ruggles v. Patten, 8 Mass. 480, the action was on a note payable at the Penobscot Bank. The defendant's fourth plea was, after protesting that he was ready and willing to pay at the time and place mentioned, that the plaintiff was not present to receive payment, and did not demand it. The court say this is no bar to an action on a promise to pay money.

Whatever be the rule in other courts, the rule of this court must be considered settled in the case of Wolcott v. Van Santvoord: That, when a promissory note is payable at a particular place on a day certain, the holder of the note is not bound to make a demand at the time and place, by the way of condition precedent to the bringing of an action against the maker. But if the maker was ready to pay at the time and place, he may plead it as he would plead a tender, in bar of damages and costs, by bringing the money into court.[5]

In the case of a note payable on demand at a certain place, a bank, for instance, I apprehend a demand would be necessary, and must be averred. 5 Taunt. 30; 16 East, 112. But in the case now under consideration the plaintiff in error did not state enough in his plea in the court below. The plea is bad in two particulars: (1) It should not have been pleaded in bar of the action, but of the damages. (2) It should have shown that the defendant was then ready, by bringing the money into court.

Judgment affirmed.

[5] Accord: Florence Oil Co. v. Bank, 38 Colo. 119, 88 Pac. 182 (1906).

FARMERS' NAT. BANK OF ANNAPOLIS v. VENNER et al. VENNER v. FARMERS' NAT. BANK OF ANNAPOLIS.

(Supreme Judicial Court of Massachusetts, Suffolk, 1906. 192 Mass. 531, 78 N. E. 540.)

MORTON, J. These two actions were tried together before a judge of the superior court sitting without a jury. The first is an action of contract by the plaintiff bank, as the holder of a certain promissory note, against the defendants as makers, to recover the balance alleged to be due after the sale and application of the collateral. The note is dated "New York City, May 14, 1892," and is payable on demand after date to the order of the makers at the office of Wilson, Colston & Co., Baltimore, and is indorsed by the defendants. The writ is dated May 13, 1898, the last day before the action would have been barred by the statute of limitations. The plaintiff is a banking association organized under the laws of the United States and having its usual place of business at Annapolis in the state of Maryland. The defendants formerly were copartners doing business in New York City under the name of C. H. Venner & Co. Personal service was made in this state on the defendant Venner, but no service was made on either of the other two defendants. The firm of C. H. Venner & Co. was dissolved July 31, 1892, and the assets became the sole property of the defendant Venner.

The second action is tort for the alleged conversion of $26,000, par value, bonds of the American Waterworks of Omaha, Neb., pledged as collateral to secure the payment of the above note. The note provided, amongst other things, that the holder might sell the collateral or any part thereof on nonperformance of his promise by the maker "in such manner as the holder hereof may deem proper without notice at any stock exchange or at public or private sale at the option of the holder hereof, and with the right on the part of the holder hereof to become purchaser thereof at such sale." It also contained a provision that "in case of depreciation in the market value of the security hereby pledged * * * a payment is to be made on account or additional approved security given upon demand, so that the market value of the security shall always be at least ten (10) per cent. more than the amount unpaid on this note. In case of failure to do so this note shall be deemed to be due and payable forthwith * * * and the holder hereof may immediately reimburse himself by a sale of the security in the manner provided for above." The note is signed "C. H. Venner & Co." and the words "Due on demand" immediately precede the signature.

There was evidence tending to show, or from which it could have been found, that the note and bonds were presented to the defendant Venner in person at his office in New York City and a demand for payment was made. There also was evidence that a demand was made upon him for the payment of $5,000 on account, and for additional col-

lateral under circumstances which justified the latter according to the terms of the note. Neither of the demands thus made was complied with. There was no evidence of a presentment or demand at the office of Wilson, Colston & Co. in Baltimore, or that there were funds there to meet the note if it had been presented. The collateral was sold through the firm of A. H. Muller & Son in New York City and was bid in for the bank at a price, except as to one bond, very much less, as there was testimony tending to show, than other bonds of the same issue were sold for before and after the sale in question. This constitutes the conversion complained of. It is conceded, or, at least, is stated in the bill of exceptions as a fact, that A. H. Muller and Son were proper auctioneers, and that the place where the bonds were sold was a proper place to sell them.

The judge found for the plaintiff in the first action in the sum of $21,665.26, and for the defendant in the second action.[6] The cases are here on exceptions by the defendant Venner to the refusal of the judge to give certain rulings requested by him and to the finding that was made.

We see no error in the rulings or refusals to rule, or in the finding that was made.

The defendant Venner contends in the first place that no action can be maintained on the note because no demand was made for its payment at the office of Wilson, Colston & Co., in Baltimore. It is settled in this state both at common law and recently by statute and by the weight of authority in this country, contrary to the law in England, that, where a note or bill of exchange is payable at a particular time and place, no demand or presentment at the place named is necessary in order to entitle the holder to maintain an action upon the note or bill against the maker or acceptor. Ruggles v. Patten, 8 Mass. 480; Carley v. Vance, 17 Mass. 389; Payson v. Whitcomb, 15 Pick. 212; Wright v. Vermont Life Ins. Co., 164 Mass. 302, 41 N. E. 303. Rev. Laws, c. 73, § 87. For a collection of cases see 1 Dan. Neg. Inst. (3d Ed.) 643; 1 Pars. Notes and Bills (1st Ed.) p. 305 et seq.; 4 Am. & Eng. Ency. of Law (2d Ed.) 373. We see no valid distinction between a note payable on time at a particular place and a note payable on demand at a particular place. No demand is necessary, before suit, where a note is payable generally on demand. And as we have seen no demand is necessary when a note is payable on time at a particular place. It seems to us that the fact that both circumstances are found in the same note cannot operate to change the rule and render a demand necessary when it would not otherwise be required. McKenney v. Whipple, 21 Me. 98; Gammon v. Everett, 25 Me. 66, 43 Am. Dec. 255; Haxton v. Bishop, 3 Wend. (N. Y.) 13; Montgomery v. Elliott, 6 Ala. 701; Dougherty v. Western Bank, 13 Ga. 287; Bowie v. Duvall, 1 Gill & J. (Md.) 175.

[6] That part of the opinion relating to the second action is omitted.

We think, therefore, that the refusal of the judge to rule as requested, that in order to maintain the action the plaintiff was bound to prove a demand at the office of Wilson, Colston & Co. and that a refusal of a demand to pay the note at any other place did not constitute a default in the payment of the note, was correct, and that the judge was right in ruling, as he did, that a sufficient demand was made though not made at the office of Wilson, Colston & Co. in Baltimore. The note is dated and apparently was made in New York. But it was given in renewal of a note previously held by Wilson, Colston & Co. and was to be paid in Baltimore, and, it fairly may be inferred, was delivered to the plaintiff bank at its usual place of business in Annapolis. It must be regarded, therefore, either as a New York or Maryland contract. If it is to be regarded as a Maryland contract then the decisions by the highest court in that state which were put in by the plaintiff bank would seem to show, so far as they bear upon the question, that a demand at the office of Wilson, Colston & Co. was not necessary in order to enable the plaintiff to maintain its action. Bowie v. Duvall, 1 Gill & J. (Md.) 175. No evidence was introduced as to the law of New York and in the absence of such evidence it is to be assumed that the law of that state is the same as the law of this. Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838. * * *

Exceptions overruled.[7]

PRICE v. NEAL.

(Court of King's Bench, 1762. 3 Burr. 1354.)

This was a special case reserved at the sittings at Guildhall after Trinity term, 1762, before Lord Mansfield.

It was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neal was indebted to him in £80. for money had and received to his the plaintiff's use: and damages were laid to £100. The general issue was pleaded; and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows: "Leicester, 22d November, 1760. Sir: Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Poughfor; as advised by, sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush lane, Cannon street, London." Indorsed: "R. Ruding; Antony Topham; Hammond and Laroche. Received the contents. James Watson and Son. Witness, Edward Neal."

That this bill was indorsed to the defendant for a valuable consideration; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40. and take up the said bill, which was done accordingly.

[7] Accord: Hyman v. Doyle, 53 Misc. Rep. 597, 103 N. Y. Supp. 778 (1907).

That another bill was drawn as follows: "Leicester, 1st February, 1761. Sir: Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush lane, Cannon street, London." That this bill was indorsed: "R. Ruding; Thomas Watson and Son. Witness for Smith: Right & Co." That the plaintiff accepted this bill, by writing on it, "Accepted John Price," and that the plaintiff wrote on the back of it: "Messieurs Freame and Barclay: Pray pay forty pounds for John Price."

That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his banker's for payment, and was paid by order of the plaintiff, and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neal acted innocently and bona fide, without the least privity or suspicion of the said forgeries or of either of them, and paid the whole value of those bills.

The jury found a verdict for the plaintiff; and assessed damages £80. and costs 40s. subject to the opinion of the court upon this question:

"Whether the plaintiff, under the circumstances of the case, can recover back, from the defendant, the money he paid on the said bills, or either of them."

Mr. Stowe, for the plaintiff, argued that he ought to recover back the money, in this action; as it was paid by him by mistake only, on supposition "that these were true genuine bills;" and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at Guildhall, of Jenys v. Fawler et al. (an action by an indorsee of a bill of exchange brought against the acceptor), Lord Raymond would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer, to swear "that they believed it not to be so;" and he even strongly inclined, "that actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee."

But he urged, that in the case now before the court, the forgery of the bill does not rest in belief and opinion only; but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated, "that that bill was accepted before it was negotiated;" on the contrary, the consideration for it was paid by the defendant, before the plaintiff had seen it. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff; and therefore the reason, upon which Lord Raymond grounds his inclination to be

of opinion "that actual proof of forgery would be no excuse," will not hold here.

Mr. Yates, for the defendant, argued that the plaintiff was not entitled to recover back this money from the defendant.

He denied it to be a payment by mistake; and insisted that it was rather owing to the negligence of the plaintiff; who should have inquired and satisfied himself "whether the bill was really drawn upon him by Sutton, or not." Here is no fraud in the defendant; who is stated "to have acted innocently and bona fide, without the least privity or suspicion of the forgery; and to have paid the whole value for the bills."

Lord MANSFIELD stopt him from going on; saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff can not recover the money, unless it be against conscience in the defendant, to retain it; and great liberality is always allowed, in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid, without the least privity or suspicion of any forgery.

Here was no fraud; no wrong. It was incumbent upon the plaintiff, to be satisfied, "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill, he actually accepts; after which acceptance, the defendant innocently and bona fide discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and then found out "that they were forged;" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

PER CUR'. Rule—that the postea be delivered to the defendant.[8]

[8] "Both the referee and the judge who wrote the prevailing opinion below thought that the case was controlled by section 112 of the negotiable instruments law (Consol. Laws, c. 38), which provides that the acceptor of a negotiable instrument admits 'the existence of a drawer, the genuineness of his signature, and his capacity and authority to draw the instrument.' This enactment is merely declaratory of the common law. The leading English case in which it is enunciated is Price v. Neal, 3 Burrow, 1354, decided by Lord

MINET et al. v. GIBSON et al.

(Court of King's Bench, 1789. 3 Term R. 481.)

This was an action on a bill of exchange; and the first count in the declaration stated that Livesey & Co. on the 18th February, 1788, made a bill of exchange, directed to the defendants, requiring them three months after date to pay £72. 5s. to John White, or order, Livesey & Co. well knowing that no such person as J. White existed; on which bill an indorsement was made, purporting to be the indorsement of J. White named in the bill, requiring the contents to be paid to Livesey & Co. or order; that Livesey and Co. (by one Absalom Goodrich, by procuration of Livesey & Co.) indorsed to the plaintiffs; and that the defendants accepted it, knowing that no such person as J. White existed, and that the name of J. White so indorsed was not the handwriting of any person by that name.

The second count, after stating the drawing of the bill, as above, proceeded thus: Livesey & Co. knowing that J. White was not a person dealing with, or known to, Livesey & Co. and using the name of J. White in the bill as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually indorsed by him; upon which bill a certain indorsement was made, requiring the payment to be made to Livesey & Co.; and that Livesey & Co. indorsed to the plaintiffs, without having delivered the bill to J. White, and without any actual indorsement or assignment of the bill by White.

The third count stated that the bill was made payable to themselves, Livesey & Co., by the name and description of J. White.

The fourth treated it as a common bill payable to J. White or order, and that J. White indorsed it to the plaintiffs.

Mansfield in 1762. The leading New York case to the same effect is National Park Bank v. Ninth National Bank, 46 N. Y. 77, 7 Am. Rep. 310. But the doctrine of these decisions, now found in the rule formulated by section 112 of the negotiable instruments law, applies only in favor of one who is a holder for value of the instrument which turns out to have been forged. Thus Lord Mansfield in Price v. Neal, supra, dwelt upon the fact that the bill of exchange there in question had been indorsed to the defendant 'for a fair and valuable consideration which he had bona fide paid,' and in the leading New York case (National Park Bank v. Ninth National Bank, supra) it appeared that the draft had been discounted by the Livingston National Bank and indorsed to the defendant, which was a bona fide holder. The rule therefore that he who accepts a negotiable instrument to which the drawer's name is forged is bound by the act, and can neither repudiate the acceptance nor recover the money paid, has no application in behalf of one who has acquired the paper in the absence of any consideration whatever therefor, either present or past. Such was the case here according to the finding of the referee. So far as appears, the check of the Green estate, which proved to be forged, was not given in payment of any existing or antecedent indebtedness either on the part of that estate or even of the forger. For these reasons we agree with the learned judge who wrote for the minority in the Appellate Division, saying: 'Section 112 of the negotiable instruments law, upon which the referee based his decision, has nothing to do with the question.'" Title Guarantee and Trust Co. v. Haven, 196 N. Y. 487, 89 N. E. 1082, 1083 (1909).

The fifth as payable to bearer; and that plaintiffs were the bearers.

The sixth payable to J. White or order, with an averment that, when the bill was made, there was no such person as J. White, the supposed payee, but that the name was merely fictitious; by reason whereof the sum mentioned in the bill became and was payable to the bearer thereof, according to the effect and meaning of the bill—averring also that the plaintiffs were the bearers and proprietors thereof.

The seventh count stated that there was a partnership, or house, of certain persons using trade as well in the name and firm of Livesey & Co. as in the name and firm of J. White; that the last mentioned persons made a certain other bill (the hand of one of them on their joint account, and in their copartnership name and firm of Livesey & Co. being thereto subscribed), and directed it to the defendants, requiring them three months after date to pay to the said last mentioned copartners, by the name of J. White or order, £721. 5s.; and that the said last mentioned copartners afterwards by a certain indorsement in writing appointed the contents to be paid to the plaintiffs, and delivered the bill so indorsed to them.

There were also other counts for money had and received by the defendants to the use of the plaintiffs; for money paid, laid out, and expended by the plaintiffs to the use of the defendants; and for money lent and advanced by the plaintiffs to the defendants. The defendants pleaded the general issue.

A special verdict was found (this question first came before the court on a motion for a new trial; but, as it was of so much importance, bills to the value of near a million a year having passed through these houses only, the court recommended it to the parties to consent to have a special verdict, in order that the record might be carried to the house of Lords, and the counsel for both parties, without going to another trial, agreed upon stating this verdict), stating (in substance) that Livesey & Co. made a certain instrument in writing, directed to the defendants, requiring them, three months after date, to pay to John White or order £721. 5s.; that Livesey & Co. at the time of making it well knew that no such person as J. White, in the bill mentioned, existed; that a certain indorsement in writing was afterwards made by Livesey & Co. purporting to be the indorsement of J. White, and requiring the contents of the bill to be paid to Livesey & Co., or their order; that Livesey & Co. afterwards indorsed (by A. Goodrich by procuration of Livesey & Co.) to the plaintiffs for a full and valuable consideration, when the plaintiffs became and still are the holders of the bill; that the defendants afterwards accepted, well knowing that no such person as J. White, in the bill named, existed, and that the name of J. White so indorsed thereon was not the handwriting of any person of that name; that the defendants at the time of the making, and accepting, the bill had not, nor had they at any time since, any money, goods, or effects, whatsoever of or belonging to Livesey & Co. or of

the plaintiffs in their hands; and that the defendants have not paid the bill (although often requested). But whether upon the whole matter the defendants are liable, etc., the jurors are ignorant, and pray the advice of the court, etc.

This verdict was set down in this day's paper for argument; but

THE COURT, being of opinion that this case was decided by that of Vere v. Lewis, 3 Term R. 182, gave judgment for the plaintiffs, without hearing any argument, adding that they understood that the reason why it was agreed to be turned into the shape of a special verdict was that it might be carried up to the dernier resort.

Judgment for the plaintiffs.[9]

DRAYTON et al. v. DALE.

(Court of King's Bench, 1823. 2 Barn. & C. 293.)

Assumpsit by the plaintiffs, as indorsees, against the defendant, as the maker, of a promissory note, dated the 22d of September, 1818, for £50., for value received, payable 24 months after date, to one Gauntlett Clarke, or his order, and by the said G. Clarke indorsed to Messrs. Knight and Freeman, and by them indorsed to the plaintiffs. Pleas, first, general issue, and secondly, the bankruptcy of the said G. Clarke and one G. Whitehead the younger, by virtue of a commission of bankrupt dated and issued the 19th November, 1814, and an assignment therefore by the commissioners to Messrs. Gibson, Wilson and Howell, dated the 1st December, 1814, by reason of which and by force of the statute in such case, etc., the interest, title, and right to indorse the said promissory note in the declaration mentioned, before and at the time of the indorsement by G. Clarke, became and was vested in the said assignees, and not in the said Clarke, and thereby the indorsement of Clarke became void, and created no right in the plaintiffs to sue. The plaintiffs joined issue on the first plea, and replied to the second, that after the assignment to the assignees, the indorsement of Clarke was made by him by and with the consent of the said assignees. Rejoinder denying such consent, whereupon issue was joined. At the trial, before Abbott, C. J., at the adjourned sittings at Guildhall, after Hilary term, 1821, a verdict was found for the plaintiffs for £51. 10s., subject to the opinion of the court upon a case which stated the issuing of the commission, and the assignment to the assignees named in the plea, and that they executed a power of attorney to Clarke to collect debts, and sue in their names, etc. At the time of the bankruptcy the defendant was indebted to Clarke's separate estate in a sum much exceeding the amount for which the promissory note was given. Wilson was the sole acting assignee, and he having desired Clarke to pro-

[9] Affirmed in the House of Lords, 1 H. Bl. 569.

ceed against the defendant for the recovery of the debt, Clarke proposed to take that debt upon his own account, and Wilson assented to that proposal. Clarke informed the defendant of this arrangement, and he gave the promissory note in question in part payment of his debt; Clarke indorsed it for a bona fide debt to Knight and Freeman, and the latter indorsed it for a valuable consideration to the plaintiffs. Neither Knight and Freeman nor the plaintiff knew of the circumstances under which the note was given. Upon counsel being heard in a former term, the court were of opinion that there was not any evidence that the note was indorsed by Clarke with the consent of all the assignees, and they ordered the verdict to be entered for the plaintiffs on the first issue, and for the defendant on the second issue, and that the case should be submitted for argument upon the following question, whether or not the plaintiffs were entitled to the judgment of the court upon the whole record so framed, notwithstanding the verdict found for the defendant on the special plea.[10]

BAYLEY, J. I am of opinion that the plaintiffs are entitled to retain their verdict on the general issue, and that the verdict on the special plea is not sufficient to deprive them of the judgment in this case. This is an action upon a note payable to Clarke or to the order of Clarke. The defendant, therefore, by making such note, intimates to all persons that he considers Clarke capable of making an order sufficient to transfer the property in the note. The defense now set up is, that although he has issued a security to the world, importing on the face of it that Clarke was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public. It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world, that the other has such power. Thus in Taylor v. Croker, 4 Esp. 187, before Lord Ellenborough, a bill was drawn by two infants; the defendants accepted, and the two infants indorsed, and it was held that inasmuch as the defendants had, by accepting the bill, admitted that the infants were competent to indorse, they should not be permitted afterwards to say that they were incompetent. So in this case the defendant has affirmed to the world that Clarke was capable of making an order. The facts are, that the bankrupt indorsed to Knight and Freeman, and that they indorsed to the plaintiffs, and that neither the plaintiffs or Knight and Freeman knew that Clarke was a bankrupt. It is settled by many decided cases, that though an uncertificated bankrupt cannot resist the claim of his assignees to any property which he has acquired since his bankruptcy, yet that he may acquire property and maintain actions in respect of it, unless the assignees interfere to prevent him. This question was much discussed in Chippendale v. Tomlinson. That was an action upon an attorney's bill. The defendant

[10] The arguments of counsel and the opinions of Abbott, C. J., and Holroyd, J., are omitted.

pleaded the bankruptcy of the plaintiff before the bill was incurred, and that plea was held insufficient, on the ground that the rights of the assignees were not to be taken into consideration, unless they themselves interfered. That case has since been followed by Fowler v. Downe, and other cases. It appears to me that as the defendant, by the form of his note, has stated that he will pay to Clarke's order, he cannot now allege Clarke's inability to make an order as a ground of defense to this action; and, secondly, that the bankrupt may acquire property subsequently to his bankruptcy, and retain that property against all the world, except his assignees.

Judgment for the plaintiffs.

HALIFAX et al. v. LYLE.

(Court of Exchequer, 1849. 3 Exch. 446.)

Assumpsit. The first count stated, that the Governor and Company of Copper Miners in England, on the 15th of July, A. D. 1847, made their bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the order of the said Governor and Company of Copper Miners in England £2,000. twelve months after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and the said Governor and Company of Copper Miners in England then indorsed the same to the plaintiffs, and the defendant then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and indorsement. Breach, nonpayment. * * *[11]

The defendant also pleaded, fifthly, that the said Governor and Company of the Copper Miners in England, by whom the said bill is alleged to have been made, as in that count mentioned, before and at the time of the making and indorsing of the said bill of exchange, respectively were, and from thence hitherto have been, and still are, a body politic and corporate in name and in deed, made, created, constituted and incorporated by and under the name and style of the Governor and Company of the Copper Miners in England, under and by virtue of certain letters patent, etc.; and that the said bill of exchange purported to be and was a bill made and drawn by the said body corporate, and was accepted by him the defendant, as a bill so made and drawn by the said body corporate, and not otherwise; and that the said body corporate had not, at the time of the said indorsement, or at any time whatever, authority to indorse any bill or bills of exchange, or to issue or negotiate any such bill or bills, or to pass or transfer the right to receive payment of such bill or bills, by an indorsement thereof in the name or under the designation of the Governor and

[11] The fourth plea and the arguments of counsel are omitted.

Company of Copper Miners in England, or otherwise howsoever. Verification.

Special demurrer to the fourth plea, on the ground that it was an argumentative denial of the indorsement as alleged in the declaration.

Special demurrer to the fifth plea, assigning for causes that it was an argumentative denial of the indorsement; that it attempted to put in issue matter which the defendant was estopped from denying, viz., that the Governor and Company of Copper Miners ever had authority to indorse the bill, as in the declaration mentioned; that it appeared on the face of the declaration, that the bill was payable to the order of the said drawers thereof, and therefore that the defendant could not deny the authority of the drawers of the bill to indorse, as in the declaration mentioned; that the plea left it doubtful whether the defendant meant to deny that the Governor and Company of Copper Miners ever had authority to indorse, etc., bills, or whether their authority to indorse, etc., bills, expired or determined after the accepting of the bill, and if the latter, that the plea should have shown how and in what way such power and authority ceased or was determined; that the plea attempted to put in issue, and did put in issue, matter of law; that the plea was bad, for stating that the drawers had not authority to indorse any bill of exchange, instead of showing how or why, or facts from which the court could judge whether such drawers of the bill had such power or not; that the plea should have shown that the drawers of the bill were not a trading corporation at the time of the indorsement of the bill. Joinder in demurrer.

The defendant's points for argument were, that the fourth plea admitted an indorsement in fact by writing on the back of the bill, but avoided the effect of it, by showing that such indorsement could not transfer the right to sue upon the bill, for that a corporate body cannot, unless specially authorized by act of Parliament, transfer any property or right, except by or under its common seal; and if there were any such special authority enabling them so to do, the plaintiffs should have shown it by their replication; that the fifth plea was a sufficient answer, because the doctrine, that an acceptor is estopped from denying that the bill is the bill of the supposed maker, does not apply to an indorsement of the bill by the maker, inasmuch as the estoppel rests on the ground that the bill was accepted after it was made, and with full knowledge by the acceptor of the manner of making it; whereas the indorsement may be subsequent to the acceptance, and consequently not admitted by it; also, that the objection was not an objection of fact, which could be met by an estoppel, but an objection of law, arising out of the fact that the company were a corporate body, and not authorized to indorse bills.

The judgment of the court was now delivered by

PARKE, B. We think our judgment in this case must be for the plaintiffs. [After stating the pleadings, his Lordship proceeded:] On the argument, the learned counsel for the defendant very properly gave

up the fourth plea, and admitted that the judgment of the court upon that must be against him.

He argued very ably in support of the fifth; but we think that also is bad, on the ground that the acceptor of a bill, payable to the order of the drawer, cannot deny the authority of the drawer to draw and indorse. The case of Sanderson v. Collman, 4 Man. & G. 209, was relied upon on the part of the defendant. That case shows, that an estoppel in pais may be replied; it does not follow that it must. My Brother CRESSWELL gives his opinion, that the plea itself was clearly bad, because it set up as a defense what, if true, would be no answer to the action; and we think that opinion is correct. The law is well settled by that and former cases (Drayton v. Dale, 2 B. & C. 293; Taylor v. Croker, 4 Esp. 187) that the acceptor of a bill, or maker of a note, payable to the order of another, cannot be permitted to deny the authority of that person to indorse. It is, in truth, a contract with that other person, prima facie for a valuable consideration, to pay to his order, and which is transferable by the law merchant; and that contract he is bound to perform, as he is all other valid contracts; and if, for the want of such a consideration, it be not a binding contract, he must show it by an affirmative allegation. If the fact be that he accepted the bill or made the note, leaving a blank for the payee's name, and the name was filled in without his authority, he ought to have denied the acceptance of the bill, or the making of the note. On this plea it must be assumed that the acceptance was put on the bill after it was drawn; or that, if it was accepted with the name of the drawer and payee in blank, the name was afterwards filled up by the defendant's authority. That being so, and the plaintiffs being assumed to be holders for value, and bona fide, the contrary not being pleaded, what is termed an estoppel appears on the declaration, and the plea is therefore bad. There is stated on the face of the pleadings a valid contract, and binding by the law merchant on the defendant, to pay to the indorsee of the corporation.

Judgment for the plaintiffs.

GOVERNOR & CO. OF BANK OF ENGLAND v. VAGLIANO BROS.

(House of Lords, [1891] App. Cas. 107.)

Action by Vagliano Bros. against the Bank of England for a declaration that the defendant, which was plaintiffs' banker, was not entitled to debit plaintiffs with the amounts paid on their behalf by defendant upon certain forged bills of exchange drawn upon and accepted by them payable at defendant's bank. Judgment for plaintiffs. Defendant appeals.

Lord HERSCHELL. My Lords, I propose to deal at the outset with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the court below.

The facts material to this part of the case I take to be these. The bills in question purported to be drawn by Vucina, but were, in fact, entirely the production of Glyka, a clerk in the service of Vagliano Bros., the respondents. He fraudulently procured the necessary forms to be printed and filled them up, inserting the name of Vucina as drawer and of C. Petridi & Co. as payees. A firm of C. Petridi & Co. carries on business at Constantinople, and had been the payee of some genuine bills previously drawn by Vucina upon Vagliano Bros. I think there can be no doubt that this fact suggested to Glyka the insertion of the name of C. Petridi & Co.; but I do not believe that he made this choice with the idea that it would assist his fraud. I entertain no doubt, under the circumstances disclosed by the evidence, that Vagliano Bros. would equally have accepted the bills if any other name had been inserted, and that Glyka knew this. It was of course never intended by Glyka that Petridi & Co. should be the persons to whom the bill should be paid. The name was inserted merely to make the bills complete in form. The bills were accepted by Vagliano Bros. payable at the Bank of England, who were requested by Vagliano Bros. to pay them at maturity. They were presented for payment with indorsements to all appearance regular, these having been written by Glyka, and were paid to the persons presenting them at maturity.

The conclusion at which the majority of the Court of Appeal arrived with reference to the construction of the subsection of the Bills of Exchange Act with which your Lordships have to deal is thus stated: "The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term 'fictitious' may be satisfied if it is fictitious as regards himself, or in other words fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle." [12]

The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned judges who concurred in this conclusion to an elaborate review, with the result that

[12] In reaching this conclusion the Court of Appeal reviewed the following cases: Bennett v. Farnell, 1 Camp. 130, 180c (1807); Tatlock v. Harris, 3 Term Rep. 174 (1789); Vere v. Lewis, 3 Term Rep. 182 (1789); Gibson v. Minet, 1 H. Bl. 569, 288 (1791); Cooper v. Meyer, 10 B. & C. 468 (1830); Beeman v. Duck, 11 M. & W. 251 (1843); Phillips v. Imthurn, L. R. 1 C. P. 463 (1866); Ashphitel v. Bryan, 5 B. & S. 723 (1864).

it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and, further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned judges that if the exception was to be further extended, it would rest upon no principle, and that they might well pause before holding that section 7, subsec. 3, of the statute was "intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change."

My Lords, with sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon, is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to

question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.

Turning now to the words of the subsection, I confess they appear to me to be free from ambiguity. "Where the payee is a fictitious or nonexistent person" means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the subsection may be treated as payable to bearer, and I am accepting too for the moment the meaning attributed by the majority of the Court of Appeal to the word "fictitious," viz. a creation of the imagination, confining myself to the question in what cases a bill purporting on the face of it to be payable to order may be treated as payable to bearer. I find it impossible, without doing violence to the language of the statute, to give any other answer than this—In all cases in which the payee is a fictitious or nonexistent person. The majority of the Court of Appeal read the section thus: "Where the payee is a fictitious or nonexistent person, the bill may, as against any party who had knowledge of the fact be treated as a bill payable to bearer." It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, " 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious "as regards" the acceptor. I have a difficulty in seeing how a payee, who is in fact a "fictitious" person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world—how such a payee can be "fictitious" as regards one person and not another. The truth is the words "as regards" the acceptor are treated as equivalent to the words "to the knowledge of" the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret those words as meaning "to the knowledge of," only tends to obscure the fact that the condition that the payee must be fictitious to the knowledge of the person sought to be charged as upon a bill payable to bearer is being introduced into the enactment.

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer it is enough to prove that the payee is in fact a fictitious

person, and that it is not necessary if it be sought to charge the acceptor to prove in addition that he was cognizant of the fictitious character of the payee.

My Lords, if the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense, or is otherwise than in accordance with sound commercial principle. I will assume that as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision even was arrived at little more than a century ago, and was dissented from by distinguished judges, and it is obvious from the observations of Lord Ellenborough in Bennett v. Farnell, 1 Camp. 130, 180c, that by some eminent lawyers at least it was regarded rather as a departure from strict principle, which ought not to be further extended than as an embodiment of sound commercial principle.

But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention for a moment to the relative position and rights of the drawer and acceptor of a bill of exchange. A drawee who accepts a bill does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment; that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment.

In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer, if he pays the person so designated, or some one deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment; he will or may remain liable to the real payee, or those claiming under him, and the acceptor having paid otherwise than according to the directions of the drawer cannot justify the use of his funds in making the payment, or claim to be reimbursed by him. But now suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, indorses the payee's name, and puts the bill into circulation. He certainly intended it to obtain currency and to be paid at maturity, and he as

certainly did not intend it to be paid only to the payee named, or some one deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person and such person only.

What, then, is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that even before the Bills of Exchange Act such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer, then, such a bill could be treated as payable to bearer. But if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, of the liability which he regarded as his security for payment. The holder in such a case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity—but to whom? Not to the fictitious payee, or some one claiming through him. Why not, then, to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And if it were the law that the acceptor was bound in such a case to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or in case he had not provided such funds if he were held liable to reimburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for reimbursement. His position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer.

It may be that the right of the holder to treat such a bill, as against an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer, could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer who knew that the payee was a fictitious person. I will assume that this was the law prior to the recent statute. But why should not the Legislature have intervened with a positive enactment imposing this liability upon the acceptor—an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods.

The Legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought improbable that the Legislature should have created in the holder of a bill drawn payable to a fictitious person a new right against the acceptor? If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable and bring it more into conformity with the course of commercial transactions, I can see no reason for doubting that the Legislature so intended, if this be the plain natural meaning of the words they have used, or for endeavoring so to construe the language as to find in it no more than a statement of the previous law.

I have dwelt at some length upon this point because it appeared to me important to show that the words of the enactment might have their natural effect given to them without leading to results either unjust or commercially inconvenient. But I desired also to elucidate the principle upon which the enactment was, in my opinion, based; because this is not without its bearing upon the next question to be considered, and to which I will now pass. It is to my mind one of greater difficulty.

Even assuming, it is said, that where the payee is a "fictitious" person the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, whilst in the present case "C. Petridi & Co." was the name of a firm having a real existence, so that the payee here cannot be termed a fictitious person. But are the words "where the payee is a fictitious person" incapable of legitimate application in any other case than that suggested? The first observation I have to make is that, if so, there was no necessity for the introduction of the word "fictitious" in the enactment; the word "nonexistent" would have sufficed. It was argued that, whilst a fictitious person is one who has never existed, a nonexistent person is one who has existed but whose existence has ceased. But even if this be admitted, the word "nonexistent" would have sufficed, for it can hardly be doubted that it is employed as suitably in reference to that which has never existed as to that which, having existed, exists no longer.

Without, however, dwelling too much on this point, which may perhaps have a historical explanation, let me call attention to the inconvenient complexity and strange and unmeaning distinctions to which, as it seems to me, the construction adopted by the Court of Appeal would give rise. If, for example, a drawer inserts, after the words "Pay to the order of," a name which he invents, himself indorses that name, and puts the bill into circulation, it is within the terms of the statute, and may be treated as a bill payable to bearer. But if he inserts the first name that occurs to him, though he never intends a bearer of that name to be the payee, or that title shall only be made through him, but himself indorses this bill and puts it into circulation just as he did the other, this bill, as I understand the court below, stands in a

different position. The case is not within the statute, and if the bill can be treated, even as against the drawer, as a bill payable to bearer, this does not depend upon the words of the enactment, but must result from the rules of the common law, which, in so far as they are not inconsistent with the express provisions of the act, are by section 97, subsec. 2, still to apply to bills of exchange.

It follows that, according to the view of the majority of the Court of Appeal, the Legislature has dealt by express enactment with one case of estoppel—that is to say, where the payee is a "fictitious person" in the sense which they attribute to those words—but has left the analogous case, where, though the payee was not fictitious in that sense, the name was inserted as a mere pretense, and without any intention that payment should be made to the person designated, undealt with, and the rights and liabilities upon the bill to be ascertained by an appeal to the rules of the common law. Certainly a strange proceeding in a code of this description, and one for which it would be difficult to find a satisfactory explanation.

But this is not all. If I am right in thinking that in the case of a payee who is a fictitious person (whatever be the meaning of that expression) a bill may, as against the acceptor, be treated by a lawful holder as payable to bearer, whether the acceptor knew of the fiction or not, why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person; the drawer in neither case intending a person so designated to receive payment, and in each case himself indorsing the bill in the name of the nominal payee before putting it into circulation? I am at a loss for any reason why this distinction should exist. It is true that there is this difference between the two cases—that in the one an indorsement by the named payee is physically impossible, whilst in the other it is not. But I do not think this difference affords a sound basis for a distinction between the respective rights and liabilities of the drawer, acceptor, and holder. It seems to me that it would in each case be reasonable, and, on the same grounds, that the acceptor should be liable to the holder of the bill, indemnifying himself out of the funds of the drawer or obtaining reimbursement from him.

It must be admitted, of course, that if the language of the statute is not reasonably capable of any other interpretation than that adopted by the majority of the Court of Appeal, if it will not allow of a construction which would cover the case we have been considering, then one must submit to the conclusion that the Legislature has left the law in this respect in an unsatisfactory position and full of distinctions devoid of any sound principle. But are we compelled to this conclusion? Do the words "where the payee is a fictitious person" apply only where the payee named never had a real existence? I take it to be clear that by the word "payee" must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that payment should be made to any such person. Where,

then, the payee named is so named by way of pretense only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not—that it is an entry made for the purpose of pretending that the transaction took place which is represented by it.

In his report of the case of Stone v. Freeland, 1 H. Bl. 316, note, the learned reporter speaks of there having been in that case "a fictitious indorsement." The facts were that a bill had been drawn payable to Butler & Co., and indorsed in that name. There was a house, Butler & Co., with whom Cox, the drawer, had dealings; but the bill had never been in their hands, and appeared to have been indorsed by Cox. Now, in what sense was the word "fictitious" here used? Not, surely, to convey the idea that the indorsement had no real existence and was a mere creature of the imagination, but that it was put forward as being that which it was not.

These seem to me to be instances (and other illustrations might be given) of an analogous use of the word "fictitious" to that which, I think, may be attributed to it in the statute. Turning to the interpretation of the word "fictitious" in Dr. Johnson's Dictionary, I find amongst the meanings given are "counterfeit," "feigned." It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretense only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are "where the payee is a fictitious person," and not "where the payee is fictitious." There is not, to my mind, any substantial difference in the meaning of the two phrases; and I cannot think that the Legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretense merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.

I have hitherto been considering the case of a bill drawn by the person whose name is attached to it as drawer, whilst the bills which have given rise to this litigation were not drawn by Vucina, who purported to be the drawer, his name being forged by Glyka. I think it was hardly contended on behalf of the respondents that this made any difference. The bills must, under the circumstances, as against the ac-

ceptor, be taken to have been drawn by Vucina, and if they have been made payable to a fictitious person within the meaning of the statute, I do not think it is open to question that they may, as against the acceptor, be treated as payable to bearer, in every case in which they could have been so treated if Vucina had drawn them. If, in the present case, Vucina had himself drawn the bills and inserted the name of C. Petridi & Co. as payees, as a mere pretense without intending any such persons to receive payment, it follows from what I have said that in my opinion they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi & Co. was inserted.

Assuming, then, that the bills in question are within the subsection of the Bills of Exchange Act which we are considering, and may therefore be treated as bills payable to bearer, the question remains, By whom may they be so treated? By a bona fide holder for value, certainly; and in considering the construction of the section, I have thus far limited my attention to the case of such a holder. It is the case which ordinarily arises in the course of commercial transactions with negotiable instruments, and it is the one, therefore, which must be taken to have been primarily had in view in framing a law to determine the rights and liabilities in respect of such instruments. But I can see nothing in the words of the enactment to confine their application to this case.

It appears to me that the natural answer to the question which I have proposed is this: A bill, within the subsection, may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer. I, of course, exclude the case of one who is a party to, or who has notice of, a fraud. At all events, I can see no reason why a banker who has been requested to pay the bill by his customer, the acceptor, may not so treat it. Where the bill is, in truth, payable to order—that is to say, where the drawer intends that payment should be made only to the person named as the payee, or to some one deriving title through him—then the direction to the banker must, since the decision in Robarts v. Tucker, 16 Q. B. 560, be taken to be a direction to pay to such person only. But where the payee is a fictitious person, within the meaning of the subsection, I think the direction to the banker must be taken to be to pay the bearer. It is by reason of his filling that character that the holder is entitled to demand payment of the acceptor. And when a banker has been instructed by the acceptor to pay such a bill on his behalf, it is to the person filling that character that he must be taken to have intended the payment to be made. If the holder were a bona fide holder for value who, if payment had been refused, could hold the acceptor liable, I do not think this could be doubted; and where the bill is one which might be treated as payable to bearer by a bona fide holder, so that the direction to the banker to pay the bill is a

direction to pay the bearer, I do not think that the banker is any the less entitled to charge the payment of the bill against his customer because the bearer to whom payment is made holds it under such circumstances that the acceptor could successfully resist a claim for payment by him. It cannot be doubted that this would be so where a bill was in terms payable to bearer, and I do not think there is any sound distinction in the relative position of banker and customer between this case and that of a bill which may be treated as payable to bearer.

I cannot think that the view I have indicated works any injustice. It is too late now to question the decision in Robarts v. Tucker, 16 Q. B. 560. It has been long acted upon and regarded as law, though the decision certainly seems to have rested upon the assumption that it was possible for a banker to do that which would be, commercially speaking, absolutely impracticable, viz. to investigate the validity of all the indorsements before he complied with the direction of his customers and paid the bill. In the case there dealt with, however, the complaint of the customer was that the banker had paid the wrong person, leaving him liable to pay the right one. Here the position of the customer is that in spite of his direction to the banker to pay the bill he ought not to have made payment to any one. The conclusion at which I have arrived is exclusively based upon the construction of the terms of the statute, uninfluenced by these considerations; but I am glad to think that it leads to a result which cannot, in my opinion, be regarded as either unjust or commercially inconvenient.

The conclusion which I have indicated is sufficient to determine the case in favor of the appellants. I have not found it necessary, therefore, to form a decisive opinion upon the other questions raised; but I do not desire to be understood as dissenting from the view, entertained by some of your Lordships, that, apart from the provisions of the statute, the facts of the present case afford sufficient grounds for arriving at the same decision.

Judgment reversed.[18]

[18] The opinions of Lord Halsbury, L. C., and Lords Watson, Macnaghten, Morris, and the Earl of Selborne, concurring with Lord Herschell, are omitted. Lord Bramwell, with whom Lord Field concurred, dissenting, said:

"The other ground on which the defendants claim to charge the plaintiffs with the amount of these bills is that Petridi & Co., the payees, were fictitious persons within the meaning of Bills of Exchange Act, § 7, subsec. 3, and that the defendants therefore might pay them to a de facto bearer. I differ on both points. It must be borne in mind that the Bills of Exchange Act is 'An act to codify the law relating to bills of exchange,' not to alter or amend it, and by section 97 the rules of common law, including the law merchant, 'save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange.'

"Then were Petridi & Co. fictitious or nonexisting persons? There was a firm of that name, a firm as identifiable as N. M. Rothschild & Co., as Glyn, Mills, Currie & Co., as the Bank of England itself would be identifiable if their names appeared as payees of a bill of exchange; and to my mind that shows they were not fictitious or nonexisting persons. It is asked, 'What if the payee were John Smith?' Well, if there were nothing to identify a

CLUTTON v. GEORGE ATTENBOROUGH & SON.

(House of Lords, [1897] App. Cas. 90.)

The appellants, Messrs. Clutton, as land agents managed large estates. One of their clerks named Piper by an elaborate and long-continued system of fraud and forgery of vouchers and certificates (explained in detail in [1895] 2 Q. B. 306) caused checks to be drawn payable to the order of George Brett and signed by members of the appellants' firm. The checks then passed into the department in which Piper was for postage. He indorsed the checks in the name of George Brett and took them to the respondents, who gave him cash or value for them in good faith. The checks were afterwards paid by the appellants' bankers to the respondents' bankers. There was no such person as George Brett, and no such work done or materials supplied as were vouched for by the forged vouchers and certificates. The appellants, having discovered the fraud, brought an action against the respondents to recover the amounts (between £3,000. and £4,000.) as money paid under a mistake of fact. The action was tried before Wills, J. (without a jury), who gave judgment for the defendants ([1895] 2 Q. B. 306), and this decision was affirmed by the Court of Appeal ([1895] 2 Q. B. 707, Lord Esher, M. R., and Lopes and Kay, L. JJ.).

particular John Smith as payee, when all 'the surrounding circumstances' were looked at, it may be that he might be treated as a nonexistent person. But what if it was shown that the bill was delivered to a particular John Smith, in payment of a debt due to him from the drawer, could any holder of it treat it as payable to bearer, Smith's name being forged as indorser? Certainly not; but then it is said that that is not the case here; that the bill was not delivered to Petridi & Co., nor intended to be so; that, in the intention of the makers of the bill, Petridi was a sham, and so fictitious or nonexistent; that Petridi & Co. are not fictitious nor nonexistent; that they exist in the flesh, yet they are fictitious qua payees, constructively fictitious; that if Vucina had drawn the bill, Petridi was real and existent, but inasmuch as Glyka did not mean Petridi to have the bill he was nonexistent. This beats me. They are at the same time real and unreal; they are that which is said to be an impossibility, being and not being at the same time. The bill means one thing or another, according to the intent of the drawer; that the drawee has or has not a right to Petridi's indorsement, according as that intent is one thing or another. Because the argument would be the same if Vucina had really drawn the bills, but not intended Petridi to have them; a possibility, if Vucina will forgive me. That if Glyka had intended to commit his fraud through the innocent agency of Petridi, Petridi would be real and not fictitious. If the argument is good, it would show that a bona fide holder of these bills not claiming through Petridi might have enforced payment from the plaintiffs. It is said that such a payment—i. e., to himself—is according to the intention of the drawer. So it is of the drawer de facto, but not of him who by the bill itself the drawee has a right to suppose is the drawer. The plaintiffs are estopped to deny that Vucina is the drawer; but they are not estopped to deny that Vucina meant that Petridi and his assigns should receive the amount of the bill, and that it should not be paid unless indorsed by Petridi.

"This argument, as I have said, makes the effect of a bill depend, not on the meaning of the writing, but on the intent of the maker. A bill pay-

The plaintiffs brought this appeal.[14]

Lord HALSBURY, L. C. * * * The drawer of these checks hands them to one of his own clerks, puts them in circulation, and they get into the hands of a bona fide holder for value. Now, forsooth, we were treated to a long argument to show what was the intention of the drawer—to make that which is a bill payable to bearer a bill payable to order only. I have nothing to do with the intention of the drawer beyond this: That I find the document is on the face of it made payable to a person who is "nonexisting." Whatever might have been said in Vagliano's Case, [1891] A. C. 107, where there were questions raising a doubt upon the applicability of those words, or whatever might be said about the difference between the words "fictitious" and "nonexisting," it has in this case never been suggested that on the face of these instruments the name of George Brett is anything other than the name of a nonexisting person. Why am I, upon this very plain and manifest state of facts to inquire into what would be the case if there was a person, as there was in Vagliano's Case, [1891] A. C. 107, who might plausibly be represented as the person intended by the drawer to be the person to whom the payment was to be made? In this case no such question arises at all; and treating, therefore, these checks as checks payable to bearer, the broad fact comes that the genuine drawer attached his own signature to checks perfect in form, that he handed them to his own clerk for the purpose of their being paid away, but by an act of fraud on the part of a clerk they get into the hands of a bona fide holder for value; and we are treated to this somewhat protracted argument in order

able to the Bank of England is payable to a fictitious person if the drawer intends to forge their name and give it to another person. A payee is real or fictitious, at the option of the holder, within the act. But it was shown that a bill drawn like these might get into the hands of Petridi & Co., though not so intended, who might take it for value and be entitled to maintain an action against the plaintiffs. Would Petridi be fictitious then? It is asked, 'What difference does it make to the plaintiffs that there is a C. Petridi & Co., when, if the payee had been actually fictitious or unreal, and the name was put on the back of the bill, it might be treated as payable to bearer?' The answer is obvious. If the payee is a known person, the drawee can well believe that the drawing is genuine; he knows he cannot be made to pay without that person's indorsement; he knows that before presentment for acceptance the bill has been in ordinary course, or at all events will be, in the hands of a responsible person if a good name is used. His holding and indorsement are a guarantee that the bill is in right hands. Take this very case. Glyka could not have got Petridi's indorsement. I do not mean could not in point of law, but could not practically. Without that the plaintiffs were not bound to pay the bill. I have no doubt that Glyka chose Petridi's name to avoid suspicion. If it had been a strange name, it might have attracted attention and caused some inquiry.

"An argument is used which, with all submission, I think very feeble. It is said that the statute says 'fictitious or nonexisting,' and that fictitious is needless on the plaintiff's construction. I do not agree. But what is the value of such an argument? Nothing, unless there is no other. A prudent draftsman does not accurately examine whether a word will be superfluous. He makes sure by using it."

[14] Arguments of counsel and parts of the opinions are omitted.

to decide the question whether under these circumstances the drawer of these genuine checks is liable upon them to a person who has received them in good faith and paid value for them.

My Lords, I do not profess to differ in any one respect from the judgments which have been delivered by the Court of Appeal; and my own opinion is that it would be treating this case with a respect that it does not deserve if one were to go more elaborately into the question than to say that I entirely concur with what was said by the learned judges in the Court of Appeal, and that I hope we shall not again have an argument of this sort upon a matter which, if it really could be made a matter of question, would throw very considerable difficulty and doubt upon the currency of negotiable instruments. I therefore move your Lordships that this appeal be dismissed with costs.

Lord SHAND. My Lords, I am also of opinion that this appeal should be disallowed.

The first question to be determined in the case is whether the checks in question were or were not, in the language of the statute, to be "treated as payable to bearer." Upon that question I entertain no doubt. Apart from the dicta and authority of the Vagliano Case, [1891] A. C. 107, I should have had no difficulty on the statute. The statute expressly provides that where the payee is a fictitious or nonexisting person the bill (and under the statute a check is to be regarded as a bill) may be "treated as a bill payable to bearer." These checks were in favor of a person of the name of Brett. He was fictitious, because that name had been provided by a person who wished to commit a fraud and to appropriate the money of his employer. He knew no person of that name, and the person who got the checks knew no one of that name, and, in the language of the statute, I think these were therefore checks in favor of a fictitious person and a nonexisting person. But it appears to me further that the decision and grounds of judgment in Vagliano's Case, [1891] A. C. 107, are directly applicable to the present. There is no limitation in the language of the statute of the effect of the insertion of the name of the fictitious or nonexisting person as payee of a check to the case where this is done in the knowledge of the drawer, and nothing to warrant a judicial interpretation of the statute in this limited way. * * *

Lords MACNAGHTEN and DAVY were of the same opinion.

Affirmed.

MACBETH v. NORTH & SOUTH WALES BANK.

(Court of Appeal, [1908] 1 K. B. 13.)

Appeal by the defendants from the judgment of Bray, J., [1906] 2 K. B. 718.

The action was brought to recover damages for the conversion of a check. The facts, which are fully stated in the judgment of Bray, J., were shortly as follows:

The plaintiff's claim was for damages for the conversion of a check, or alternatively for money had and received to the plaintiff's use. The facts, which are stated at length in the judgment, may be summarized as follows: One White, by falsely representing to the plaintiff and his brother-in-law, one Irvine, that he had agreed to buy from a man named T. A. Kerr 5,000 shares in a company called White's Carriage Company at £2. 5s. per share, and that he had arranged to resell the shares to a syndicate for £2. 10s. per share, induced the plaintiff and Irvine to agree to assist him in financing the transaction. For the purpose of paying Kerr for the shares the plaintiff drew a check on his bank, the Clydesdale Bank, for £11,250., payable to Kerr or order, which check was sent by him to Irvine for him or White to hand to Kerr in exchange for the scrip and transfer of the 5,000 shares. Irvine accordingly handed the check to White, in order that he might hand it to Kerr in exchange for the scrip and transfer of the shares. Instead of so doing White forged Kerr's indorsement to the check and paid it into his own account with the defendant bank, who credited him with the amount and obtained payment of the check from the Clydesdale Bank. White had in fact never agreed to buy any shares from Kerr, and Kerr did not hold any shares in White's Carriage Company.

Judgment for the plaintiff. The defendant appealed.[15]

Lord ALVERSTONE, C. J. * * * That leaves the third question, which raises a very important point, for determination, viz. whether or not the defendants are entitled to treat the check as a check payable to bearer on the ground that Kerr is a fictitious or non-existing person within the meaning of section 7, subsec. 3, of the Bills of Exchange Act, 1882. Whatever view may be held as to the weight of judicial opinion in Vagliano's Case, [1891] A. C. 107, we are bound to apply the principle to be collected from the judgments of the House of Lords in that case. I quite agree with the observation made by Warrington, J., in giving judgment in Vinden v. Hughes, [1905] 1 K. B. 795, to the effect that if certain expressions in the judgments in Vagliano's Case, [1891] A. C. 107, are taken alone and consideration is not given to the subject-matter to which they were addressed, it may be that the language used supports the contention on behalf of

[15] The arguments, and parts of the opinions relating to other points, are omitted.

the defendant bank that because Kerr had no connection with the transaction at all, and his name was really introduced by White for the purpose of White's fraud, he (Kerr) might be regarded as being a nonexisting person. I agree that the question as to a fictitious or nonexisting person cannot be answered by simply asking if there is some one who corresponds with the name. The name of some distinguished person might be inserted in a bill, but he might be a fictitious or nonexisting person for the purpose of the section we have to consider.

In my opinion the view taken by Warrington, J., in Vinden's Case, [1905] 1 K. B. 795, and by Bray, J., in the present case, is correct. In giving judgment in Bank of England v. Vagliano Bros., [1891] A. C. 107, Lord Herschell said: "In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee. * * *"

I call attention to the words "intended by the drawer," because it must be remembered that the point in Vagliano's Case was whether the acceptor was entitled to say that the payee was not fictitious or nonexistent for the purposes of his (the acceptor's) own protection. It is very important to remember that in Vagliano's Case the instrument was a bill of exchange in the ordinary sense of the word, and the point raised was raised by the acceptor. The acceptor of a bill protects the credit of the drawer of the bill. It does not matter in the least to the acceptor who the payee is. When a bill of exchange is presented to a person for acceptance, the drawer asks him to honor his signature as drawer and to accept the bill, and the credit of the drawer may be partially protected even though the acceptor does not choose to go the full length of accepting the bill. Therefore, in dealing with a payee of a bill in the ordinary sense of the word, very different considerations from a commercial and mercantile standpoint arise to those which arise when the particular form of a bill of exchange which is called a check upon a bank is being dealt with. It is for that purpose that it is so important to see whether, in the terms formulated by Lord Herschell, the payee designated in the bill is a real person intended by the drawer to receive payment by himself or by some transferee. It is the drawer who selects and inserts the name which is put in the body of the bill as being the payee's name. Therefore, if the person who inserted the name in the bill knew that the person was fictitious or nonexistent, then the consequences follow that the bill may be treated as against the acceptor (if I may use the expression) as being a bill to bearer, with the consequences pointed out in Vagliano's Case.

It must not be forgotten that a check upon a banker is treated as a bill of exchange only by virtue of the law merchant and section 73 of the Bills of Exchange Act, 1882, which says that a check is a bill of exchange drawn upon a banker payable upon demand. In ordinary parlance there is no acceptor to a check. The bank which pays the

money alone stands in the position of the acceptor. If the bank gives credit it simply honors the check and pays the money.

Applying Lord Herschell's test, we must consider whether, in any given case, when the drawer of a check inserts a payee's name, he intends the payee to receive payment by himself or by some transferee from him; in other words, whether he intends that the payee who has to indorse the check payable to order shall receive payment. In the present case it is not disputed that so far as the plaintiff Macbeth is concerned there was a real transaction. He got his bank to advance this money and drew his check, intending that there should be a real sale, as he believed, by a man named Kerr, of the 5,000 shares in White's Carriage Company. It is not suggested that the plaintiff had the least idea that any one would receive the proceeds of the check except a person named Kerr—an existing person bearing that name—who, by the fraud of White, he had been induced to believe did possess the 5,000 shares. Although Kerr had had some shares in the company, at that moment he had none at all. It seems to me that if I put to myself the question, "Is this an ordinary case where the payee designated in the check is a real person intended by the drawer of the check to receive payment?" there can be but one answer, viz. that the person who inserted the name did not insert the name of a fictitious person in the sense of a person who he knew had no connection with the transaction. He did not put in the name of a nonexisting person, but he put in the name of a person from whom, as he believed, the shares were coming, and to whom alone the money was to go.

I am therefore of opinion, following the point decided in Bank of England v. Vagliano Bros., and taking the test laid down by Lord Herschell in that case, that the judgment of Bray, J., is correct. I might make the same observations with regard to the passages in the judgments of Lord Halsbury, L. C., and Lord Macnaghten, but no useful purpose would be served by repeating them. I have endeavored to state what appears to me to be the real decision in Bank of England v. Vagliano Bros., and its bearing upon the present case. On behalf of the defendants the decision in Clutton v. Attenborough was relied upon. If I found anything in Clutton v. Attenborough which led me to believe that the House of Lords meant to construe the judgments in Bank of England v. Vagliano Bros. as applying to the case of a drawer of a check who has inserted the name of a person believing it to be that of a real person and the transaction a genuine one, and who was induced to do so by the fraud of another person, of course the authority, although we might not have been bound by it, would have been a very strong justification of the view urged on behalf of the defendants. It is, however, impossible to take that view in the face of what Lord Halsbury decided. The judgments in that case proceeded throughout upon the basis that Brett, the payee of the check, was a nonexisting person. The summary of the facts states that

"there was no such person as George Brett." That statement does not mean, of course, that there was no person whose name was George Brett. I myself am aware of the fact that there are persons bearing that name, one of whom I know. The statement means that the case was argued upon the basis of George Brett being a nonexisting person, and this point obviously being in the mind of the members of the House of Lords, Lord Halsbury says: "Whatever might have been said in Vagliano's Case, where there were questions raising a doubt upon the applicability of those words, or whatever might be said about the difference between the words 'fictitious' and 'nonexisting,' it has in this case never been suggested that on the face of these instruments the name of George Brett is anything other than the name of a nonexisting person. Why am I, upon this very plain and manifest state of facts, to inquire into what would be the case if there was a person, as there was in Vagliano's Case, who might plausibly be represented as the person intended by the drawer to be the person to whom the payment was to be made?" The great importance of that passage is that Lord Halsbury, L. C., adopted the expression used by Lord Herschell in the passage in his judgment in Bank of England v. Vagliano Bros., to which I have referred, when he used the words "the person intended by the drawer to be the person to whom the payment was to be made"—or, in other words, he indicated that the state of circumstances which gives rise to the question whether the person can be regarded as fictitious or nonexisting depends upon the intention of the person who inserts the name. Immediately that is appreciated, whether the decision in Vagliano's Case be approved of or not, the broad distinction between the two cases becomes apparent. Then Lord Halsbury, L. C., followed up what he had said by adding: "In this case no such question arises at all." Therefore it cannot be said that in Clutton v. Attenborough, [1897] A. C. 90, Lord Halsbury recognized as regards a check the argument urged by the defendant based upon Vagliano's Case.

With regard to Vinden v. Hughes, [1905] 1 K. B. 795, which is not binding upon us, Warrington, J., appears in that case to have taken the true view of Vagliano's Case and of Clutton v. Attenborough, and, if I may say so with great respect, I entirely agree with the judgment of Warrington, J., in Vinden v. Hughes, and I could not hope to express the reasoning better. He, having taken the words of Lord Herschell in Bank of England v. Vagliano Bros., says: "He [the drawer] had every reason to believe, and he did believe, that those checks were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those checks." In the present case it is not disputed that the plaintiff believed the check was being drawn for the purpose of being paid to an existing person named Kerr, in a transaction which he believed to be genuine, and which, so far as he was concerned, had no element of fictitiousness about it. In my opin-

ion, therefore, notwithstanding the most interesting and able argument on behalf of the defendants, our judgment ought to be in accordance with the opinion of Bray, J., and Warrington, J., and the judgment for the plaintiff must stand.

BUCKLEY, L. J. The third question is that upon which I wish to say a few words, because it is of importance under the Bills of Exchange Act, 1882. The language of section 7, subsec. 3, of that act is: "Where the payee is a fictitious or nonexisting person the bill may be treated as payable to bearer." Two different states of fact are contemplated by that subsection—the one is that the payee is fictitious, the other that he is nonexistent. Existence or nonexistence of a particular person is a question of fact, not relevant to anybody's mind or intention. "Fictitious" is different. A thing can only be fictitious relatively to some one. There can be no action without an actor, no pretense without a pretender, and no fiction without a feigner. Fiction is necessarily relative.

What is meant by "fictitious" in this connection? I think it means fictitious by the pretense of some person who is a party to the instrument. The relevant point in the present case is that Kerr was not fictitious by any pretense of the plaintiff The plaintiff made no pretense. He feigned nothing. He was deceived. He thought Kerr had shares, but Kerr had no shares. The plaintiff had a real intention of paying £11,250. to a person whom, it is true, he had never seen, but who existed in fact, and to whom he meant to pay £11,250. as the price of the shares. In my opinion Kerr was, for no relevant purpose, fictitious. The whole effect of Bank of England v. Vagliano Bros., for the purposes of the present case, seems to me to be this—that, as Lord Macnaghten said, the bills when they came before Vagliano for acceptance were wholly fictitious. The drawer, the payee, and the person indicated as agent for presentation were all fictitious. When Vagliano accepted that instrument he accepted the responsibility of becoming liable upon the document—such as it was—having regard to, amongst other things, section 7, subsec. 3, of the Bills of Exchange Act, 1882. He rendered himself liable to pay the bill drawn as it was by a person who forged the name of the drawer, and inserted a fictitious payee. When Vagliano accepted that, he made himself responsible upon an instrument which, by the operation of the act of 1882, was necessarily to be treated as being payable to bearer. If that is the true meaning of Vagliano's Case, I need not add anything to show it has nothing to do with the present case.

On behalf of the defendants we have been pressed with the decision of the House of Lords in Clutton v. Attenborough. Having regard to the expressions of Lord Halsbury, it is clear that he was not deciding the point which we have now to decide. It appears to me there is a difference in substance between the two cases. If the drawer of a check chooses to take the responsibility of drawing it to a nonexistent person, no doubt the result of the statute is that he can-

not complain because the check is not indorsed. That is the whole of the decision in Clutton v. Attenborough. In my opinion that has no relevance to the meaning of the word "fictitious," which I have endeavored to show involves an investigation into the mind of the drawer of the bill. I find in the judgments in Vagliano's Case—I refer in particular to Lord Herschell's judgment on pages 151 to 153, inclusive—that again and again the intention of the drawer is pointed to as being relevant. It seems to me that it is a cardinal fact. Was the drawee a fiction to the drawer? If he was, then he is a fictitious person. It seems to me that the present case is not governed by Bank of England v. Vagliano Bros. On the contrary, I think it is governed by the decision of Warrington, J., in Vinden v. Hughes, [1905] 1 K. B. 795, which in my judgment was rightly decided, and that Bray, J., was right in the view he took. For these reasons I think that this appeal fails and must be dismissed.

KENNEDY, L. J. I am of the same opinion. My Lord and BUCKLEY, L. J., have so fully dealt with all the points that there would be no use in my adding anything.

Appeal dismissed.[16]

CANAL BANK v. BANK OF ALBANY.

(Supreme Court of New York, 1841. 1 Hill, 287.)

Assumpsit, to recover money paid on a draft, tried at the Albany Circuit, in 1840, before Cushman, C. J. The draft was drawn on the plaintiffs by the Montgomery County Bank, payable to the order of E. Bentley, Jr. It purported to have been indorsed successively by Bentley, then by one Budd, afterward by the Bank of New York, and lastly by the defendants, to whom the plaintiffs paid it. The payment of it was made on the 28th of March, 1839. The ground on which the plaintiffs sought to recover back the money was that the indorsement purporting to be that of Bentley was a forgery, which fact was proved by Bentley and others on the trial.

On the 7th of June, 1839, the plaintiffs' attorney called on the defendants, and asked to have the money refunded, notifying them at the same time of the forgery.

When the plaintiffs offered Bentley as a witness, the defendants objected, insisting that he was incompetent, as being interested. The objection was overruled, and Bentley permitted to testify; whereupon the defendants excepted.

The defendants offered to prove, and the plaintiffs admitted, that they (defendants) received the draft from the Bank of New York to collect, as agents for the latter, and that as such they received the money and paid it over to their principals, before notice of the for-

[16] Affirmed, [1908] App. Cas. 137. Accord: Vinden v. Hughes, [1905] 1 K. B. 795.

gery. The defendants, however, never disclosed their agency to the plaintiffs till called on by the plaintiffs' attorney, as above mentioned, and notified of the forgery.

The defendants further offered to show a uniform custom of the banks of this state to receive and collect drafts in the manner this was done, without disclosing their agency. The plaintiffs objected, on the ground of irrelevancy, and the judge overruled the offer, to which the defendants again excepted.

A verdict having been rendered for the plaintiffs, the defendants now moved for a new trial on a bill of exceptions, presenting the above and some other points.

COWEN, J. It is not perceived what advantage, direct or remote, Bentley can derive from the plaintiffs' recovery, nor what he can lose by their failure. It is said, the plaintiffs will hold the money to be recovered in trust for the witness. This is not so. Their recovery or failure will neither add to nor take from their liability to him. Their recovery will not, as the defendants' counsel supposes, estop them to deny that Bentley's name was forged. The record and proceedings here would not, as such, be any evidence whatever between him and the plaintiffs. The whole is but a more solemn admission of the forgery; and his being sworn as a witness adds nothing to its strength in his favor. Should he sue the Montgomery County Bank, and should they plead payment, they would have the same right to contest the forgery as if this suit had never been; nor could any of the proceedings here be used as evidence against the witness, even though the plaintiffs should fail to establish the forgery against these defendants.

On the merits, there was nothing in the nature of the transaction to conclude the plaintiffs against showing the forgery. They had done no act giving currency to the bill on the strength of Bentley's name. Even had they accepted it on the day when it was drawn, the defendants could have holden them concluded only in respect to the genuineness of the drawer's name, he being their immediate correspondent. Chit. on Bills (7th Am. Ed. of 1839) 336. And the act of payment could amount to no more. Id. Neither acceptance nor payment, at any time, nor under any circumstances, is an admission that the first, or any other indorser's name is genuine. Id. 628. In point of title, then, the case of the defendants was the same as if the name of Bentley had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged title as a genuine one. The plaintiffs paid their money under the mistaken belief thus induced, that the name was genuine. To a note or bill payable to order, none but the payee can assert any title without the indorsement of such payee; not even a bona fide holder. Id. 286, a, 430.

But it is said the equities of the parties are equal, and the defendants, having possession, must prevail. No doubt the parties were

equally innocent in a moral point of view. The conduct of both was bona fide, and the negligence or rather misfortune of both the same. It was the duty, or, more properly, a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; and that was conceded throughout, in the authority cited on another point by the defendants' counsel. United States Bank v. Bank of Georgia, 10 Wheat. 333, 354, 6 L. Ed. 334. The whole course of argument and authority in that case went on the fault of the party who paid the money. It was likened to the case of a bank paying a check, on which the name of the drawer was forged, which was again assimilated to the acceptance of a bill of exchange, where the drawer's name is forged. It was said that, in such cases, the payor or acceptor takes upon himself the knowledge of his correspondent's handwriting, and shall be concluded. Even that is going a great way, unless some bona fide holder has purchased the paper on the faith of such an act. But it is sufficient to distinguish the case, that it goes on the superior negligence of the party paying or accepting. At page 355 of 10 Wheat. (6 L. Ed. 334) the court draw an express distinction between the effect of acceptance or payment as a recognition of the drawer's and the indorser's handwriting. It is said the forgery of an indorsement is not a fact which the acceptor is presumed to know. And perhaps the decision in the case cited should be rested entirely on negligence in the Bank of Georgia. Vide 10 Wheat. 344 (6 L. Ed. 334); also the case of the Gloucester Bank v. Salem Bank, 17 Mass. 33, cited 10 Wheat. 350 (6 L. Ed. 334).

But, it is said, the plaintiffs here delayed giving notice of the forgery from the 28th of March till the 7th of June. Under what circumstances is not disclosed, for the point of delay was not made at the trial. That is a sufficient reason why it should not be listened to here. But I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us.[17]

[17] Accord: Bank of Commerce v. Bank, 3 N. Y. 230 (1850); Third National Bank v. Allen, 59 Mo. 310 (1875). Contra: London & River Plate Bank v Bank, [1896] 1 Q. B. 7. In the latter case the court said:

"In Cocks v. Masterman, 9 B. & C. 902, the simple rule was laid down in clear language for the first time that when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own,

It is said the defendants had indorsers behind them; and by delay they were prevented from charging them, by giving seasonable notice. Admit this to be so; the plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to the defendants, till they accidentally discovered the forgery. If there had been any unreasonable delay after such discovery, another question would be presented. I infer from the rigor of the case cited by the defendants' counsel (Cocks v. Masterman, 9 Barn. & Cress. 902) that he would exact as great, indeed greater, diligence in giving notice than is necessary to fix an indorser. There the plaintiffs had paid to the defendants, the holders, an acceptance, purporting to be in the name of the plaintiffs' customers. The bill was drawn payable at the plaintiffs' bank. The next day, discovering the forgery, they, on the same day, gave notice to the defendants and the indorsers. This was held too late. The court even declined to give an opinion whether notice on the very day of payment would have entitled the plaintiffs to recover, but held that notice on the very day was at all events necessary, and that, short of this, the plaintiffs were not entitled to recover. They said the holder must not, by want of notice, be deprived of the right to take steps against the parties to the bill, on the very day when it was paid; and they admitted that this was requiring one day increased diligence beyond what would have been required in the ordinary case of dishonor. In the latter case, they allowed that notice on the next day would have been in season. In a previous case of payment under the like circumstances, notice having been given on the very day, the bankers, who paid for their customers, were allowed to recover. Wilkinson v. Johnson, 3 Barn. & Cress. 428. In this earlier case, the payment was made for the honor of indorsers, whose bankers the plaintiffs were. Both cases were treated by the court as standing on the same principles, though, in the latter case, they do not put it distinctly on any principle. In the earlier case, they said the plaintiffs were not the drawees, or acceptors, nor the agents of any supposed acceptors. The same thing may, I take it, be said of the latter case, though the plaintiffs assumed to pay for the acceptors. They could scarcely have intended to pay as mere agents for the acceptors, an act which would have extinguished the bill, and cut them off from a remedy against the drawers and indorsers. Where a bill or note is payable at a bank, and no express direction

and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonor to the other parties to the bill; but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, it is unimpeachable."

given by the principal to the bank, on its coming in with indorsers, the bank, of course, takes the paper as a purchaser, or holder, and for its own indemnity presents it to the principal for payment on the very day, or as soon as may be. Thus there is a good chance to detect the forgery of his name, and hurry the notices to the other parties. Whatever forgeries there may be are soon brought to light. In the earlier of the two cases cited the court said: "The general rule of law is clear and not disputed, viz. that money paid under a mistake of facts may be recovered back, as being paid without consideration." In the latter case the court do not deny the rule, nor that it would apply to the case before them. But to enforce it they require an almost impracticable diligence. I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all. In all the previous cases, where a recovery had been denied, there was carelessness, or delay, or both. Smith v. Mercer, 6 Taunt. 76, was much like Cocks v. Masterman, and there had been a neglect to discover the forgery and give notice for a week's time. The case of Price v. Neale, 3 Burr. 1354, was one of palpable neglect, in both payment and delay. Some other cases turn on similar principles. Barber v. Gingell, 3 Esp. Rep. 60; United States Bank v. Bank of Georgia and Gloucester Bank v. Salem Bank, before cited; Levy v. Bank of United States, 1 Bin. (Pa.) 27, 4 Dall. 234, 1 L. Ed. 814. If Cocks v. Masterman is to be followed, it must, I think, be on the same principle. The plaintiffs paid on the faith of their correspondents' name. The former were not named as drawees; but they had a superior knowledge of their correspondents' handwriting, which they neglected to exert. It might, therefore, have been reasonable to require that they should overcome the objection of neglect, by such a speedy movement as to save all possible advantage to the holder, against the prior parties. But, where each party enjoys only the same chance of knowledge, no case demands anything more than reasonable diligence in giving notice, after a discovery of the forgery. The common case of paying forged bank notes is one instance. And navy and victualing bills have been treated as standing on the same footing. Jones v. Ryde, 5 Taunt. 488. Bruce v. Bruce, Id. 495, note. These are cases of transferring notes from one to another, which turn out to be unavailable by reason of a forgery, in respect to which both parties are equally ignorant, the one being no more guilty of neglect than the other; indeed, neither being negligent, but both being imposed upon under the exercise of ordinary diligence. At all events, it does not lie with the payor to complain of the very neglect imputable to himself. Neglect to give notice, after discovering the forgery, is another matter. Vid. Chit. on Bills (Am. Ed. of 1839) p. 463. If the indorsers are to be charged, as such, why should not the accidental delay in discovering the forgery, on a paid bill especially, operate as an excuse for not giving them immediate notice?

The defendants did not disclose their agency, and must, therefore,

as between them and plaintiffs, be taken to have acted as principals. They obtained the money of the plaintiffs on a bill of exchange, payable to the order of Bentley, under a forged indorsement of his name. Money has been successively paid by mistake of the several indorsees, the plaintiffs, the defendants, the Bank of New York, etc., and the remedy by each is plain. It is by action over, each against his respective indorser. The bill has never been put in a regular course of negotiation, for want of Bentley's name. No one who has advanced money on it, therefore, obtained what he supposed he had got; and the indorsers, beside being liable as such, may each be sued, as having received money without consideration.

The proof offered, relative to the custom of banks to collect paper received by them as agents, without communicating the name of their principal, would have disclosed a case in which it would be apparent that the defendants might or might not have been agents. The object of the proposed proof was to supply the want of direct evidence that notice of the agency had been given by them at the time. Till they had superadded proof of another custom for banks never so to receive paper and collect as principals, the proposed evidence could have had no tendency to affect the plaintiffs with such notice. Knowledge that the defendants might be acting as agents was not enough. This is so of every man ostensibly transacting business as a principal. Vide Mills v. Hunt, 20 Wend. 433. The proof offered and rejected was, therefore, irrelevant.

New trial denied.[18]

COGGILL v. AMERICAN EXCHANGE BANK.

(Court of Appeals of New York, 1847. 1 N. Y. 113, 49 Am. Dec. 310.)

Error to the Supreme Court, where Coggill sued the American Exchange Bank in assumpsit, to recover back the money which he, as the drawee and acceptor, had paid to the bank as the holders of a bill of exchange, upon which the name of the payee had been forged. The case was this: Shapley and Billings were partners in business at Earlville, Madison county, and the plaintiff resided and did business in the city of New York. On the 28th of July, 1843, Charles S. Billings, one of the partners, drew a bill in the name of the firm, on the plaintiff, for $1,500, payable to the order of Truman Billings, 10 days after sight. Charles S. Billings forged the name of Truman Billings as indorser on the draft, and also the name of Truman Billings, Jr., and with those names upon the bill presented it to the Bank of Central New York, at Utica, for discount, on the 29th of July; and the bank discounted the bill and paid the money to Charles S.

[18] Accord: Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909), action by drawer against bank. See Andrews v. Bank, 107 Minn. 196, 117 N. W. 621, 780 (1908).

Billings. The discount was made in the usual course of business; the bank having no knowledge of the forgery, nor any reason to suppose that Billings was not acting, as he professed to do, for his firm, though in point of fact he applied the money to his own private use. The bank indorsed the draft, and sent it to the defendants for collection. The plaintiff accepted the bill, and paid the same at maturity, on the 12th of August, to the defendants. The plaintiff had no funds of the drawers in his hands, but accepted and paid the bill for their accommodation, in pursuance of an agreement made with Charles S. Billings to do so. Charles S. Billings absconded, about the 7th of August, on account of this and other forgeries. On learning that the names of the indorsers had been forged, the plaintiff, on the 18th of August, called on the defendants to refund the money, and then brought this action to recover it back. On the trial, the circuit judge charged the jury that the plaintiff was not entitled to recover, and the plaintiff excepted to his opinion. The jury found a verdict for the defendants, which the Supreme Court refused to set aside, and rendered judgment for the defendants. The plaintiff brings error.[19]

BRONSON, J. In an action against the drawee of a bill, it is not enough for the holder to prove that it has been accepted, without also establishing his title to the bill. And if the acceptor, under a mistake as to the fact of ownership, has paid the bill to one who had no title, the money may be recovered back, although it was paid to a bona fide holder. Canal Bank v. Bank of Albany, 1 Hill, 287. The plaintiff relies upon this case as not being distinguishable from his own; but he is under a great mistake. It is not expressly stated in the report of that case that Bentley, the payee named in the draft, was the owner of it; nor was it necessary that the fact should be stated, for where nothing appears to the contrary the payee must be taken to be the owner. It may, however, be proper to mention that it did expressly appear that Bentley was the owner of the draft. My recollection on the subject has been confirmed by inquiries made since the argument. In the case now before us, the fact is fully established that Billings, the payee named in the bill, never was the owner of it; nor was it drawn with the intent that he should either indorse it or have any interest in or concern with it. In the one case, the payee owned the bill, and could have maintained actions upon it, both against the acceptors and drawers; while in the other the payee has no interest in the bill, and cannot maintain an action upon it, for his own benefit, against any one. In the one case, payment to the holder of the bill would be no protection against an action by the payee, because he was the true owner; while in the other the payee, having no title, could in no event have a legal claim to the money. The distinction between the two cases is very material and is quite too obvious to be mistaken by any one.

[19] Arguments of counsel are omitted.

Although the payee, Billings, had no interest in the bill, the question still remains whether the Bank of Central New York, in whose place the defendants stand, acquired a good title to it. We think they did. Shapley and Billings drew the bill, and passed it to the bank, with the name of the payee indorsed upon it. By that act they plainly affirmed that the indorsement was genuine, so that the bill might be negotiated by delivery. By means of this representation they induced the bank to discount the bill; and if the bank had brought an action upon it against them, counting in the usual form, as upon a bill payable to Truman Billings, and indorsed by him, the drawers would, upon the plainest principles for maintaining honesty and fair dealing, have been estopped from controverting the genuineness of the indorsement. If an authority is needed in support of this doctrine, Meacher v. Fort, 3 Hill, Law (S. C.) 227, 30 Am. Dec. 364, and Id., Riley (S. C.) 248, is a case directly in point.

There is another form of declaring in which the bank might have recovered on the bill. As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. Vere v. Lewis, 3 Term R. 182; Minet v. Gibson, 3 Term R. 481; Id., 1 H. Black, 569, in the House of Lords; Collins v. Emett, 1 H. Black. 313; Plets v. Johnson, 3 Hill, 112. In legal effect, though not in form, the bill is payable to bearer; and it is always good pleading to state the legal effect of the contract. It is said in some of the cases (and see Bennett v. Farnell, 1 Camp. 130, 180, b, note) that when the action is against the acceptor of such a bill it must appear that he knew the payee was a fictitious person. But I can see no sufficient reason for laying down such a rule. It is enough that the holder has a good title to the bill, so that the acceptor, on paying it, can properly charge the amount against the funds of the drawer in his hands, if there be any, and, if there be none, that he may have an action against the drawer for money paid to his use. As the acceptor can never resort to the payee or indorser, he has no interest in knowing through whose hands the bill has passed, except for the purpose of ascertaining that the holder has a good title.

It may be well enough, by way of discouraging such transactions, to hold that one who discounts a bill for the benefit of the drawer, with knowledge of the fact that the payee is a fictitious person, cannot recover against the acceptor. Hunter v. Jefferey, Peake Add. Cas. 146. But that doctrine has nothing to do with this case; for the bank had no knowledge or suspicion, at the time the bill was discounted, that the name of the payee had been forged.

The point has been adjudged that when the maker of a promissory note puts it into circulation, with a forged indorsement of the name

of the payee upon it, a bona fide holder may sue and recover against the maker as upon a note payable to bearer (Meacher v. Fort, supra); and the same rule has been applied where the payee had no interest in the note, and it was not intended that he should become a party to the transaction (Foster v. Shattuck, 2 N. H. 446). Notwithstanding what was said in Dana v. Underwood, 19 Pick. (Mass.) 99, I think this sound doctrine; and it is applicable to the case of a bill put into circulation by the drawer with a forged indorsement upon it. A bona fide holder may treat it as a bill payable to bearer.

The bank had a good title to the bill as against the drawers and the payee, and that was a good title against all the world. No one is injured by this doctrine. The bill has answered the end for which it was drawn. The plaintiff has paid money for the drawers in pursuance of their request; and he has the same remedy against them that he would have had if the indorsement had been genuine.

I have spoken of the drawing and negotiating the bill as the act of both of the partners, although only one of them was present, because such was the legal effect of the transaction. It is said that Charles S. Billings was not the agent of his partner, Shapley, for the purpose of committing a forgery; and that is very true; but his right to draw and negotiate bills in the name of the firm has not been questioned, and that is all that is material to the present inquiry. It is not important to know who put the name of Truman Billings as indorser upon the bill. It is enough that Truman Billings was not the owner of the bill, and that it was passed to the bank with his name upon it.

As the bank discounted the bill for the firm of Shapley & Billings, it is of no importance that Billings applied the money to his own private use, instead of carrying it into the affairs of the partnership. And in relation to the estoppel, it is quite clear that the declarations and acts of one of the partners, made and done while transacting the partnership business, and relating to it, are equally conclusive upon both of them. We have not been referred to any book which holds a different doctrine.

The plaintiff probably accepted and paid the bill under the mistaken assumption that the indorsement was genuine. But he was not mistaken about the main fact which he was concerned to know, which was that the holder was the owner of the bill. Having paid the money to the proper person, the plaintiff has all the rights against the drawers which he would have had if the indorsement had been made by Truman Billings; and there is no principle upon which this action can be maintained.

Judgment affirmed.

WHITE et al. v. CONTINENTAL NAT. BANK.

(Court of Appeals of New York, 1876. 64 N. Y. 316, 21 Am. Rep. 612.)

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of defendant entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover back money paid by plaintiffs to defendant, upon an altered sight draft drawn upon plaintiffs by their correspondent, in Buffalo.

The draft was drawn for the sum of $27. After its delivery to the payee, and before presentation and acceptance, it was altered so as to change the amount to $2,750. It was sent by one Horton, of Baltimore, to Austin Baldwin & Co., New York, and received by them August 16, 1869. That firm deposited it on the same day with defendant, and for its avails sent to Horton a sterling bill of exchange on London at 60 days. Defendant credited said firm the amount of the draft. The draft was presented, August 17th, to and accepted by plaintiffs, payable at the Leather Manufacturers' Bank, by whom it was paid to defendant. In the regular course of business between plaintiffs and the drawer of the draft, monthly statements of accounts were rendered. The August account was rendered the forepart of September. It was not examined by the drawer until October 5th, when the alteration was first discovered. Plaintiffs were advised on the 6th, and immediately notified defendant.

The court charged among other things: "If the jury believe from the evidence, that if Austin Baldwin & Co. had been, either directly by the plaintiffs or by them through the defendants, informed within a reasonable time after the acceptance of the draft by the plaintiffs, that the same was forged for an amount exceeding the sum of $27, they, Austin Baldwin & Co., or the defendants, could have taken steps to trace and arrest the crime in its consummation, and have prevented the acceptance of their bill of exchange on the City Bank of London, and that they failed to take either of such steps by reason of the acceptance and payment of the draft in question by the plaintiffs, and the failure of the plaintiffs to advise them of such forgery until on or about October 6, 1869, then the plaintiffs are estopped from denying the genuineness of the draft in question, and that the defendants are entitled to a verdict." To which the plaintiffs' counsel excepted.

Plaintiffs' counsel requested the court to charge that plaintiffs were not bound to know that this draft had been altered in the way it was altered, and that all they were bound to know when they accepted it was that the signature to the draft was genuine; also, that if the plaintiffs were not legally chargeable with knowledge of the fact that the draft had been altered, no duty devolved upon them to give any earli-

er notice than was given, either to Austin Baldwin & Co. or anybody else, of the fact of the alteration.

The court declined so to charge, and the plaintiffs' counsel excepted.

ALLEN, J. The right of a party, paying money to another under a bona fide forgetfulness or ignorance of facts, to recover it back from one who is not entitled to receive it, is well established. The equitable action for money had and received will lie against one who has received money which in conscience does not belong to him. Kelly v. Solari, 9 M. & W. 54; Bank of Orleans v. Smith, 3 Hill, 560.

The doctrine has been applied, repeatedly, in cases analogous to the present. Bank of Commerce v. Union Bank, 3 N. Y. 230; Continental National Bank v. National Bank of the Commonwealth, 50 N. Y. 575; National Bank of Commerce v. National Mechanics' Banking Association, 55 N. Y. 211, 14 Am. Rep. 232; Marine National Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305.

That the plaintiffs in this action paid to the defendant, professing to be the holder of the bill, the face of it, in ignorance of the facts disentitling the defendant to receive the same, is not disputed. Their right to recover the money thus paid must be unquestioned, unless their right is barred by some circumstance which takes the case out of the general rule, or by some act of their own, they have lost the right.

Certain general principles, applicable to commercial paper and regulating the rights and obligations of the several parties thereto, are very familiar and of every-day application.

First. The plaintiffs, as drawees of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder. Kelly v. Solari, supra; Broom's Legal Maxims, 257; National Park Bank v. Ninth National Bank, 46 N. Y. 77, 7 Am. Rep. 310; Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Espy v. Bank of Cincinnati, 18 Wall. 604, 21 L. Ed. 947; Goddard v. Merchants' Bank, 4 N. Y. 147.

Second. The defendant, as holder of the bill and claiming to be entitled to receive the amount thereof from the drawees, was held to a knowledge of its own title and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. Erwin v. Downs, 15 N. Y. 575; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Story on Promissory Notes, §§ 135, 379, 380, 381. The presentation of the bill, and the demand and receipt of the money thereon, was equivalent to an indorsement. The drawees had a right to act upon the presumptive ownership of the defendant as the apparent holder.

The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery, which invalidated the bill and its title to the moneys represented by it.

It follows that there could be no negligence on the part of the plaintiffs which could defeat their right to reclaim the money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation, there was no estoppel to bar the action. The case is distinguishable from Continental National Bank v. National Bank of the Commonwealth, supra, in this: That in the case cited the officer of the bank pronounced a forged certification of a check to be genuine, upon which the payee of the check relied, as he had a right to do, and thus relying neglected to take the means then in his power to retrieve his position and save himself from loss. The court held that the circumstances created an equitable estoppel, and that the bank could not thereafter gainsay the genuineness of the certification which it had adopted and upon which the other parties had acted. It will be seen that this estoppel was based upon the admission of a fact peculiarly within the knowledge of the bank upon which the check was drawn, and which it was bound to know, and upon a positive assertion upon which the other party had a right to and did rely. In this case, as we have seen, the plaintiffs made no assertion of any fact within their knowledge, and the defendant did not act or forbear to act upon the faith of anything which the plaintiffs said or did or omitted to say or do.

Again, in the case cited, had the teller of the certifying bank disclaimed the forged certification and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New York before, as the evidence showed, he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates.

In the case at bar, it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore, have taken any effectual measures either for

arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures even if a proper foundation is laid for them in other respects. There is nothing really in the case to distinguish it from National Bank of Commerce v. National Banking Association, supra, in which the plaintiff recovered.

Should this action be retried other questions may arise not presented by this record, growing out of the relations between the defendant and other parties, and the character in which the defendant acted, whether as agent or principal. Upon the present record the equities are with the plaintiffs. If they fail to recover, they lose the money absolutely and without legal fault on their part. If the defendant is compelled to reimburse the plaintiffs, it has its remedy over against the prior indorsers; and if they in turn have no remedy against the prior indorsers, it is because they have chosen to deal with irresponsible persons, or those of whose character and responsibility they were ignorant. It would be unjust to father the consequences of their method of dealing upon innocent third persons. But waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as the case of a mutual mistake, in respect to which neither was in fault, and in that view and upon that theory, the case is within the principles decided in Bank of Commerce v. Union Bank, 3 N. Y. 230, and Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516, and the plaintiffs are entitled to a new trial.

Upon the case as made and upon the exceptions taken at the trial, I am of the opinion that the judgment should be reversed, and a new trial granted.

Judgment reversed.[20]

SEABOARD NAT. BANK v. BANK OF AMERICA.

(Supreme Court of New York, 1906. 51 Misc. Rep. 103, 100 N. Y. Supp. 740.)

Action by the Seaboard Bank, the drawee of a draft, against the Bank of America to whom as indorsee the plaintiff had paid it.

E. V. Babcock & Co., engaged in the lumber business in the city of Pittsburg, Pa., kept an account in the Federal National Bank there located. One H. R. Pennock, to the knowledge of the bank, was the auditor and chief bookkeeper of that firm, and had access to its checkbooks and its books generally, and, on occasions, he called at the bank with reference to certain financial matters of the firm. On September 17, 1904, Pennock went to the bank, and, claiming to represent E. V. Babcock & Co., presented a check purporting to be a check of that firm

[20] The dissenting opinion of Miller, J., is omitted. Compare Ward v. Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387 (1840).

drawn on the Federal National Bank to the order of "N. Y. Draft" for $2,000, and requested a New York draft in that sum, payable to the order of Carroll Bros. This firm, composed of David N. Carroll and W. T. Carroll, was likewise engaged in the lumber business in Pittsburg, but the bank was not aware of its existence, or who were its individual members. The bank complied with Pennock's request, drew on the Seaboard National Bank, the plaintiff, a draft in the sum of $2,000 in favor of "Carroll Bros.," and handed it to Pennock. Thereupon he left, and, without the knowledge of the Federal National Bank or of E. V. Babcock & Co. or of Carroll Bros., indorsed "Carroll Bros." on the draft and collected the proceeds through the defendant bank which acted in good faith. The $2,000 check which Pennock delivered to the Federal Bank was forged, presumably by him. Babcock & Co. were at no time indebted to Carroll Bros.[21]

LEVENTRITT, J. The defendant resists the claim principally on the ground that the draft was in effect payable to bearer. What was the nature of the draft? If in law it was equivalent to a draft payable to bearer, then through Pennock's indorsement of "Carroll Bros." the payee, the Mellon National Bank, and, through it, the defendant, acquired a good title to the draft. An instrument is payable to bearer not only when it is so expressed on its face, but also "when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable." Neg. Inst. Law (Laws 1897, p. 724, c. 612) § 28, subd. 3. To bring the draft within the provisions of the statute the defendant maintains that in so far as the Federal National Bank was concerned Carroll Bros., unknown to it as a firm or as individuals, was "nonexisting"; and, in so far as Pennock was concerned, Carroll Bros. was "fictitious," because it was a mere name arbitrarily selected by him to promote the fraudulent scheme which he had concocted, a firm that was a nonentity in the transaction, a stranger to it, and neither interested in, nor entitled to any of the proceeds of the draft. Thus the defendant deduces as a conclusion that Carroll Bros. was either "fictitious or nonexisting" to the only parties who participated in, or were aware of, the issuance of the draft. But the mere adoption of a random name for a payee would not, under the statute, make the instrument payable to bearer, and such result would follow only provided the "person making it so payable" knew the payee named to be "fictitious or nonexisting." The defendant argues that, in the contemplation of the statute, Pennock, and not the Federal National Bank, made the draft payable to Carroll Bros.; that in its preparation the bank acted simply as a scribe, obedient to Pennock's dictation and direction; that his mind guided the bank's hand to record intention. Let us consider these propositions.

It is uniformly recognized law that negotiable paper, the payee of

[21] The statement of the case is taken from the opinion, part of which is omitted.

which does not represent a real person, cannot be deemed payable to bearer unless the paper was put into circulation by the maker with the knowledge that the name of the payee does not represent a real person. The fictitiousness of the payee and the knowledge of the maker must concur. Then the maker's intention as disclosed by his adoption of a fictitious payee fixes the character of the paper. Shipman v. Bank of the State of N. Y., 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Irving Nat. Bank v. Alley, 79 N. Y. 536; Vagliano v. Bank of England, L. R. 22 Q. B. D. 103; Armstrong v. Pomeroy, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Gibson v. Minet, 1 H. Black. 569. But can it be said that Carroll Bros. was nonexistent merely because the Federal National Bank was ignorant of the existence of that concern? Ignorance of existence is not the equivalent of knowledge of nonexistence. Carroll Bros. was a real concern, though the bank did not know it. Conceding that conclusion, the defendant argues, in effect, that ignorance of the existence of Carroll Bros. precludes the possibility of any intention on the part of the bank that that firm should enjoy the proceeds of the draft; that if any intention so utterly colorless and purposeless could be conceived it is of no consequence; that Pennock was, in effect, the maker as he was the author of the draft; that it was his intention that the name Carroll Bros. should represent a fictitious payee, and that that intention is controlling and should prevail. That argument ignores the statute, which constitutes the intention of the maker the test, and not that of any person to whose dictation the maker submits. It also ignores the essential fact that the draft is the obligation of the bank, and that to allow the argument would enable any person to change the legal effect of the act of the obligor.

There are many precedents for the conclusion that the drawer of a negotiable instrument is liable to the drawee if payment be made to a person not named as payee. Where the drawer of a check, draft, or bill of exchange delivers it to an imposter, supposing him to be the person whose name he has assumed, the drawer must, as against the drawee or a bona fide holder for value, bear the loss where the imposter obtains payment of or negotiates the draft. The underlying reason is that it was the drawer's intention that the person to whom the instrument was delivered should be the payee, even though through fraud and imposition that intention was created. Though the victim of deception practiced by the person who adopted the name of the payee, the maker must honor the paper. Land Title & Trust Co. v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717; United States v. National Exchange Bank (C. C.) 45 Fed. 163; Levy v. Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124; Electrical Const. Co. v. Globe Sav. Bank, 64 Ill. App. 225. Under such circumstances the intention of the maker of the instrument controls, and casts upon him the consequences of the imposition. It is

because the drawee has acted in accordance with the drawer's indicated intention that the latter must make reimbursement. It is scarcely conceivable that if, under such conditions, the maker's intention is vital to involve him in liability, that under other conditions, where liability would not follow, such intention is immaterial, and must give place to the intention of a third person, here the impostor.

Let us assume that Pennock, as a stranger, had called at the Federal National Bank, had represented himself to be a member of the firm of Carroll Bros., and as such had requested the draft in suit, and the bank, believing the representation of Pennock to be true, had drawn the draft in the form in which it appears and delivered it to Pennock, then Pennock's indorsement of Carroll Bros. would have made the Federal National Bank answerable because its intention had been effectuated. But the facts are otherwise. Pennock was known to the bank; he claimed to represent his employers, E. V. Babcock & Co., and in their behalf applied for a draft in favor of Carroll Bros. as payee. He made no pretense whatever to be a member of that firm, or in anywise to be entitled as payee to the proceeds of the draft. The imposition which he practiced did not relate to his own identity. Nothing transpired which could have given rise to an intention on the part of the bank that Pennock should become the payee. The delivery to him of the draft did not import any intention on the part of the bank that he should reap the proceeds. If, under the assumed conditions, the bank is to be mulcted as a result of its intention, is it also to be mulcted under the actual conditions where a contrary intention existed? If so, the intention of the maker, which the courts have uniformly accepted as the controlling element, could be eliminated, as his liability would attach whatever his intention. In my opinion, the intention of the Federal National Bank, to the exclusion of any design of Pennock, is the controlling consideration. The bank intended to issue, as in form it did, a draft to order, and not to bearer, and handed it to Pennock, not as owner, but for delivery to E. V. Babcock & Co. or to Carroll Bros. His indorsement of Carroll Bros. was a forgery. He had no title to the draft; he could convey none. The Mellon National Bank cashed the draft in reliance on his implied warranty of title; having taken that risk, it cannot complain if it must bear the consequences of its misplaced reliance and restore to the defendant the remitted proceeds of a draft to which it did not give the defendant good title. * * *

Plaintiff's motion for a verdict granted.[22]

[22] Affirmed in Appellate Division on the opinion of Leventritt, J., 118 App. Div. 907, 103 N. Y. Supp. 1141 (1907). Accord: Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909), action by drawer against bank.

TRUST CO. OF AMERICA v. HAMILTON BANK OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department, 1908. 127 App. Div. 515, 112 N. Y. Supp. 84.)

Submission of controversy under Code Civ. Proc. § 1279, by the Trust Company of America and the Hamilton Bank of New York City. Judgment for defendant.

McLAUGHLIN, J. This is a controversy submitted to the court upon an agreed statement of facts under section 1279 of the Code of Civil Procedure. The controversy relates to four checks for $500 each, drawn upon the plaintiff, a trust company doing a banking business, and signed, "Estate of Kate M. Wallace, Arthur B. Wallace, Adm'r." At the time the checks were presented to the plaintiff for payment, the estate of Kate M. Wallace was one of its depositors, having to its credit an amount in excess of all the checks, which could be drawn out on checks signed by Arthur B. Wallace, administrator, when countersigned by the United States Fidelity & Guaranty Company. The Wallace estate had then been practically settled, and the amount on deposit was ready for distribution among the next of kin of the decedent.

The four checks in question were drawn without the knowledge or authority of the administrator, his signature being forged, and in each there was inserted as payee the name of some one of the next of kin whose distributable share of the amount on deposit with the plaintiff was greater than the amount of the check or checks thus apparently payable to such person. The first check was dated September 25, 1905, and was presented on that day to the United States Fidelity & Guaranty Company by a person unnamed, without the knowledge of plaintiff or defendant. The United States Fidelity & Guaranty Company, relying upon the apparent genuineness of the check, countersigned the same, and it was then, by some person unknown, presented to the plaintiff for acceptance and by it accepted, in writing. The name of the payee was then forged upon the back of the check as first indorser, and it was subsequently deposited with the defendant, by one M. F. Kerby, one of its depositors, who was given credit for the same. It then bore the following additional indorsements: "Harvey J. Conkey. M. F. Kerby. A. Edward Fisher." Thereafter, the defendant, through the New York Clearing House, presented the check to the plaintiff for payment, guaranteeing the indorsements, and it, relying upon the genuineness of the check, with the guarantee of the defendant thereon, not knowing that the indorsement of the payee was forged, paid the same in good faith. Substantially the same facts are true in regard to the second check, which was dated in November, 1905.

The other two checks, dated in December, 1905, and January, 1906, were not presented to plaintiff for acceptance before payment and

were deposited with defendant by Harvey J. Conkey, one of its depositors, to the credit of his account; otherwise, the same course was pursued with regard to them. They were indorsed "Harvey J. Conkey" below the forged indorsement of the payee.

Upon discovering the forgeries, the plaintiff at once notified the defendant, tendered back the checks, and demanded repayment. In the meantime both Kerby and Conkey had withdrawn the proceeds of the checks, and the defendant, relying on plaintiff's acceptance and payment of them, had paid out the same in good faith. The defendant has refused to repay plaintiff the amount of the checks, or any of them, and the question presented is whether plaintiff is entitled thereto.

The general rule is that payments made under a mistake of fact may be recovered, although negligently made; but it is also settled that, if the drawee of a bill of exchange to which the drawer's name has been forged accepts or pays the same, he can neither repudiate the acceptance nor recover the money paid, since he is bound to know the drawer's signature. Price v. Neal, 3 Burrows, 1354; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334; National Park Bank v. Ninth National Bank, 46 N. Y. 77, 7 Am. Rep. 310; Goddard v. Merchants' Bank, 4 N. Y. 147. It is also settled that, where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsements may be recovered. Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; Canal Bank v. Bank of Albany, 1 Hill, 287.

Therefore, if all the indorsements on the checks in question had been genuine, the plaintiff could not recover; but if the maker's signatures had been genuine, and only the indorsements or any of them forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures are not genuine, or recover on the ground that the same were forged, and by reason of that fact it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged indorsements of the payees, the plaintiff is entitled to recover. There are authorities to support this contention. First Nat. Bank v. Northwestern Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247; McCall v. Croning, 3 La. Ann. 409, 48 Am. Dec. 454. But it does not necessarily follow, because the checks were not indorsed by the persons whose names appeared on them as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amounts to the plaintiff.

A leading authority on the subject is Bank of England v. Vagliano Bros., L. R. 1891 App. Cas. 107, which reversed Vagliano v. Bank of England, 23 Q. B. D. 243, and 22 Q. B. D. 103. This authority has been frequently cited and is directly in point. There, Vagliano

Bros. were foreign bankers doing a large business in various parts of the world. One of their clerks, Glyka, forged a large number of bills of exchange purporting to be drawn on the firm by one of its foreign correspondents, payable to another well-known firm. He also forged letters of advice to accompany them and caused them to be presented, the same as genuine bills, to Vagliano Bros. in the regular course of business. Vagliano Bros., deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their general banker, to pay when presented. After bills had been accepted, Glyka would obtain possession of them, indorse thereon the name of the payee, and collect the money from the bank, which charged the amounts so paid to the account of Vagliano Bros. The latter, on discovering the forgeries, sued the bank to recover the amounts so paid out on the forged bills. The House of Lords held, reversing the decisions of the lower courts, that this amount could not be recovered. The decision is placed upon the ground that "since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills and never intended that it should, the payee was fictitious," and under the statute providing that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer" (Bills of Exchange Act 1882, § 7, subsec. 3), the bills of exchange were, in legal effect, payable to bearer, and the bank obtained good title, regardless of the indorsements.

Some doubt was expressed in the Bank of England Case as to whether the statute warranted such construction, since the effect was to make the fictitiousness of the payee depend upon the maker's intention; but under our own statute no such question can be raised. The negotiable instruments law provides (Laws 1897, p. 724, c. 612, § 28): "The instrument is payable to bearer: * * * (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable."

The correctness of the decision in First National Bank v. Northwestern Bank, supra, may well be questioned, since the decision of the lower court, which was reversed by the House of Lords, in the Bank of England Case, was cited at length and relied upon. Whether this be so or not, the decisions in our own state are entirely in harmony with the views expressed by the House of Lords. Thus, in Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310, a partner drew a bill of exchange in the name of the partnership, payable to one Truman Billings and forged thereon the indorsement of the latter. The bill subsequently came into the hands of the defendant bank, and the plaintiff, upon whom it was drawn, accepted and paid it. It was held that the plaintiff, on discovering the forgery, could not recover the amount paid from the defendant, since the bill was in effect payable to bearer, and defendant had good title. Mr. Justice Bronson, who delivered the opinion of the court, distinguished the case of Canal

Bank v. Bank of Albany, supra, and said: "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. * * * In legal effect, though not in form, the bill is payable to bearer. * * * The plaintiff probably accepted and paid the bill under the mistaken assumption that the indorsement was genuine; but he was not mistaken about the main fact which he was concerned to know, which was that the holder was the owner of the bill."

And in Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, the cashier of the National Bank of Sumter, S. C., drew checks in the name of the bank, inserting as payees the names of customers of the bank, whose indorsements he forged. The checks thus drawn were sent to various firms in New York and subsequently came into the hands of the defendant, which received them in good faith and charged them to the account of the Sumter Bank. The receiver of the Sumter Bank thereafter brought an action to recover the amount of these checks, and it was held that the same could not be maintained, since in legal effect the payees were fictitious and the checks payable to bearer, and for that reason the defendant obtained good title. The court, Mr. Justice Gray delivering the opinion, said: "The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys, by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter Bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. * * * The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name."

Under the negotiable instruments law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signatures, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the Bank of England and the Phillips Cases, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not it is unnecessary to consider. It has been con-

venient to thus describe them. Despite these forged indorsements, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff, having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged.

Nor is this view at all in conflict with Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. There, the plaintiffs' firm signed a large number of checks relying on the false statements of an employé; the names of the payees being in some instances fictitious and in others the names of existing persons. The employé upon whose false statements the checks were made then indorsed upon them the names of the respective payees, and the checks were thereafter paid in good faith by the bank upon which they were drawn. The court held that the plaintiffs could recover from the bank the amount paid, distinguishing the Bank of England Case, and the distinction is obvious. In the former case, the member of the firm who signed the checks in the firm name believed that in every instance the payee was a real person to whom alone the check was payable, while, in the latter case, the person who wrote the maker's signature was a forger who knew that, so far as the bills of exchange were concerned, the payee was fictitious. The court expressly recognized the rule that the maker's intention was controlling, saying: "The maker's intention is the controlling consideration which determines the character of such paper."

It is true that in many of the authorities cited the person guilty of the fraud was connected in some way with one of the parties, which may have affected the equities of the case, as was suggested in Shipman v. Bank of State of New York, supra, concerning the decision in the Bank of England Case, while here, so far as appears, the guilty party was a stranger to both plaintiff and defendant, and they are equally innocent. But that cannot change the law as to the fictitiousness of the payees, and, if it did, I am of the opinion that any equities in the present case are with the defendant. The risk of paying out money upon a forged signature of a depositor is one which a banker must assume, and, if the plaintiff had detected the forgeries when the checks were presented for payment, it would not have suffered any loss, and it is possible that the defendant would not.

I am of the opinion that the plaintiff has no legal claim against the defendant, and for that reason the latter is entitled to judgment upon the merits, with costs.

CHAPTER II

DRAWER AND INDORSER

SECTION 1.—IN GENERAL

BISHOP v. HAYWARD.

(Court of King's Bench, 1791. 4 Term R. 470.)

The plaintiff declared on a promissory note made by one Collins, payable to the plaintiff or order, and afterwards indorsed by him to the defendant, who afterwards reindorsed it to the plaintiff again. After verdict for the plaintiff on the general issue, a motion was made by Bower, in arrest of judgment, upon the ground that nothing appeared to be due to the plaintiff on his own showing; for the defendant would be entitled to recover back again the identical sum from the plaintiff for which he had now obtained a verdict against the defendant, and therefore, as this would introduce a circuity of action, which the law does not permit, the declaration was bad upon the face of it.[1]

Lord KENYON, C. J. It is an invariable rule that every plaintiff must, on his own stating of the case, show sufficient to entitle him to recover judgment against the defendant. And it is a rule equally clear that every instrument ought to be declared on according to its legal import. I do not say but that there may be circumstances, which, if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note; but we are now called upon to form a judgment on the title which he has disclosed. And on the face of the declaration he has stated the note as a legal existing note, and the indorsements as legal existing indorsements; we are therefore bound to consider them to be so. Then the case stands thus: That he, the plaintiff, being the original indorser of the note, calls on the defendant who appears on the record to be a subsequent indorsee. And nothing can be clearer in law than that an indorsee may resort to either of the preceding indorsers for payment; whereas the present action is an attempt to reverse this. I admit that a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note, e. g. that his own name was originally used for form only, and that it was understood by all the parties to the instrument that the note though nominally made payable to the plaintiff, was sub-

[1] The argument of plaintiff's counsel and the opinion of Buller, J., are omitted.

stantially to be paid to the defendant; but if such were the case, the note should have been declared on according to its legal import, as was held in Minet v. Gibson, 3 Term R. 481, 1 H. Bl. 569. A name may be omitted in the declaration, if the legal operation of the instrument requires it. But in this case the plaintiff has stated facts subversive of his title.

PER CURIAM. Judgment arrested.

SHAW v. KNOX.

(Supreme Judicial Court of Massachusetts. Suffolk. 1867. 98 Mass. 214.)

Contract on a draft by Nathaniel Heath on John W. West for payment of $450 three months after date to the order of the defendant, indorsed by the latter and bearing also, below the defendant's indorsement, the indorsement of E. Longfellow & Son.

Trial in the superior court, before Morton, J., without a jury, when it appeared that the draft was drawn on the day of its date, and indorsed by the defendant, and then at his request by E. Longfellow & Son, "so that it could be discounted" (neither of the indorsers receiving any consideration therefor), and then was negotiated, and discounted by a bank, and presented for acceptance, that it was accepted by West, but on maturity was protested for nonpayment; and that E. Longfellow & Son some months later paid it to the bank and took it up, and afterwards sold it to the plaintiff.

The defendant asked the judge to rule "that E. Longfellow & Son and the defendant were joint accommodation indorsers, and, when the former paid the draft, its negotiability was destroyed, and they could not pass it to the plaintiff so that he could maintain an action thereon." But he declined so to rule, and ruled that the plaintiff could maintain his action, and found for the plaintiff; and the defendant alleged exceptions.

BIGELOW, C. J. There was no joint liability on the part of the defendant with the subsequent indorsers. The indorsers on the draft were all liable to the holders of the draft for value on their several contracts of indorsement. There was no agreement between the parties, when the draft was made and indorsed, that they should hold any other relation towards each other than that which would result from their being successive indorsers on the draft for the accommodation of the drawer. If the last indorser paid the draft to the holder for value, he would succeed to the right of such holder, and could look to his prior indorser for payment of the amount paid by him. Guild v. Eager, 17 Mass. 615. Such payment was in fact made by the second indorsers, from whom the plaintiff derives his title to the draft. The relations of the parties to the draft can in no sense be regarded as creating a contract of joint guaranty and suretyship. The rights and

duties of the several parties to an accommodation note or bill of exchange are the same in all respects as upon notes given for value. The legal effect of the contract into which they respectively enter by becoming parties to negotiable paper is that which appears on the face of the bill or note. It follows that, if an accommodation indorser is obliged to take up the draft in the hands of a holder for value, he can look to his prior indorser for payment. Church v. Barlow, 9 Pick. 547; Clapp v. Rice, 13 Gray, 403, 74 Am. Dec. 639; Howe v. Merrill, 5 Cush. 80.[2]

Exceptions overruled.

EASTERLY v. BARBER.

(Court of Appeals of New York, 1876. 66 N. Y. 433.)

There were two appeals in this case—the one by plaintiff from an order of the General Term of the Supreme Court in the Fourth Judicial Department denying motion for a new trial and directing judgment on a verdict; the other by defendant from the judgment entered upon such order.

The action was brought by plaintiff as third indorser of a promissory note to recover the amount thereof of the second indorser.

The note in question was made by the Stevenson Manufacturing Company, payable to the order of one Knight, who indorsed it. Defendant was second indorser, plaintiff third, and one MacDougall the fourth. Defendant alleged in his answer that the note was given and discounted for the benefit of the maker, in which company all the four indorsers were stockholders; that they indorsed for the accommodation of the company under an agreement that as between themselves they should be cosureties, and share and contribute equally to the amount all or either should be obliged to pay thereon.

Upon a former trial plaintiff recovered a judgment for one-fourth the amount of the note. It appeared on such trial that the two other indorsers were insolvent. The General Term reversed the judgment and ordered a new trial on the ground that plaintiff was entitled to judgment for one-half the amount. 3 Th. & C. 421.

Upon the second, parol evidence was received to prove the allegations of the answer, which was received under objection and exception. The evidence tended to show that the note in suit was a renewal of a former note; that the agreement was made in reference to the original note, which was renewed from time to time. The testimony was conflicting as to whether any thing was said in reference to the liability as co-sureties at the time of the indorsements of the note in suit.

Plaintiff was allowed to prove, under objection and exception, the insolvency of the other two indorsers, Knight and MacDougall. Evi-

[2] Accord: State Bank v. Kahn, 49 Misc. Rep. 500, 98 N. Y. Supp. 858 (1906).

dence was given on the part of defendant tending to show that the bank which discounted the note brought suit thereon against plaintiff alone at defendant's request upon his giving security to indemnify the bank.

As to the agreement, the court charged, in substance, that if the jury found that the agreement was made as claimed by defendant, plaintiff was entitled to judgment for one-half the amount of the note, to which defendant's counsel duly excepted.

The court also charged as follows: "If former notes have been given under this agreement, with the understanding that they were to stand with a joint instead of a separate liability, and that note was carried along until it came to this one, and they signed this note with the arrangement and understanding resting upon their minds, you will have no doubt in coming to the conclusion that this agreement attaches to this last note;" to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.[3]

MILLER, J. The first question presented upon these appeals is whether it is competent in an action by one indorser against a prior indorser for the defendant to prove by parol an agreement between all the indorsers that they were as between themselves cosureties, where they are accommodation indorsers. In Barry v. Ransom, 12 N. Y. 462, it was held that an agreement made between parties prior to or cotemporaneously with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation, and it may be proved by parol evidence. It was said by Denio, J., in the opinion, that an agreement among the sureties, arranging their eventual liabilities among themselves in a manner different from what the law would prescribe, in the absence of an express agreement, would not contradict any of the terms of the bond. It was also held that the engagement among themselves had no necessary place in the instrument between them and the other contracting parties. The case cited referred to a joint and several bond, where the obligors were equally liable upon its face. No reason exists, however, why the same principle is not applicable to notes and bills of exchange. The terms of the contract contained in instruments of this character, which are within its scope to define and regulate, cannot be changed by parol; but the understanding between the indorsers is a distinct and separate subject, an outside matter, which may be properly proved independent of and without any regard to the instrument itself. This rule is distinctly established in reference to joint makers of promissory notes; and although the previous decisions had been somewhat uncertain it has been recently determined by the decision of this court that where a person signed, as surety, a joint and several promissory note, and it did not

[3] The arguments of counsel are omitted.

appear by the instrument itself that such relation existed, he might prove such fact by parol, and that such proof did not tend to alter the terms of the contract. Hubbard v. Gurney, 64 N. Y. 457. It is not apparent that any such difference exists between the two classes of cases which prevents the application of the same principle to both of them.

An attempted distinction is sought to be maintained because the relation of indorsers to each other is fixed by law, while the relations and obligations of sureties and obligors are not fixed. As between the principal and the sureties they are fixed quite as much as between indorsers, and can only be settled as between sureties where the contract does not show the fact by parol proof of the same. In support of the same views is the case of Phillips v. Preston, 5 How. 278, 292, 12 L. Ed. 152, where the doctrine is laid down that proof of a collateral contract, by parol, may be given to show the liability of indorsers as between themselves. See, also, McDonald v. Magruder, 3 Pet. 470, 7 L. Ed. 744; Aiken v. Barkley, 2 Speers (S. C.) 747, 42 Am. Dec. 397; Edelen v. White, 6 Bush (Ky.) 408; Davis v. Morgan, 64 N. C. 570. The indorsements upon bills of exchange or promissory notes rest upon the theory that the liability of indorsers to each other is regulated by the position of their names, and that the paper is transferred from the one to the others by indorsement. But this rule has no practical application to accommodation indorsers, where neither of them has owned the paper and no such transfer has been made. It is easy to see that the application of the rule contended for, in many cases, would work the most serious injustice. Suppose a person sign as accommodation maker of a promissory note, and the payee for whose benefit it is made indorses it and pays the note, and afterwards sues the maker to recover back the money; would it be seriously contended that proof could not be given to show that he was merely an accommodation maker? Clearly not; and yet such evidence would contradict the written instrument quite as much as it would to prove an agreement between indorsers in regard to their liability as between each other. Cases frequently arise where it is competent to prove that the indorsement is made for the accommodation of the maker; and a drawee may show, after acceptance, that he has no funds (Reubens v. Joel, 13 N. Y. 493) in his hands, and that he was merely an accommodation acceptor (Griffith v. Reed, 21 Wend. 502, 34 Am. Dec. 267). The cases to which we have been referred by the plaintiff's counsel do not, we think, sustain the position contended for; that parol proof cannot be given to show an arrangement between accommodation indorsers different from that which appears by the legal effect of the instrument, and a particular examination of them is not required. The uniform practice in this state has been in conformity to the views expressed in reference to proof of this character, and it would be establishing a new rule at this time to hold that such testimony was incompetent. There was,

therefore, no error committed by the judge in the admission of the evidence to which objection was taken.

There is no force in the objection made by the plaintiff's counsel that the evidence failed to establish the agreement alleged in the answer to have been made in reference to the note in suit. It was purely a question of fact what the agreement actually made was. No request was made to take the case from the jury, and sufficient was shown to submit the question raised to their consideration. There is no ground for claiming that the defendant was estopped from setting up the verbal agreement alleged to have been made as a defense. The arrangement of the defendant with the bank for the prosecution of the note and the collection of the same of the plaintiff, and the security given thereupon do not contain the elements of an estoppel. The defendant was not the actual party in the suit, and the most which can be said in regard to it is, that the defendant preferred to have it collected of Easterly instead of himself, and to compel Easterly to sue him for the proportion which he was lawfully liable to pay. There was no assumption in this, we think, that estops the defendant.

We are also of the opinion that there was no error in that portion of the charge wherein the court instructed the jury that if former notes had been given under the agreement, with the understanding that they were to stand with a joint instead of a separate liability, and they were carried along until they came to this one, which, if it was signed with the arrangement and understanding resting upon their minds, they would have no doubt in coming to the conclusion that this agreement attaches to the last note. This was a necessary result of the facts proved and clearly right. The requests to charge upon this branch of the case in this connection were properly refused, as the propositions presented were sufficiently covered in the charge which had already been made. The discussion had leads to the conclusion that sufficient grounds are presented on the plaintiff's appeal for a reversal or modification of the judgment.

Other questions arise upon the defendant's appeal, which should be considered. It is claimed that an action at law by a surety for contribution must be against each of the sureties separately for his proportion, and that no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the cosureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the amount will be adjudged among the solvent parties in due proportion. The principle stated is fully sustained by the authorities. It is thus stated, in Parsons on Contracts (volume 1, p. 34): "At law, a surety can recover from his cosurety an aliquot part, calculated upon the whole number, without reference to the insolvency of others of the cosureties; but in equity it is otherwise." See, also, Browne v. Lee, 6 Barn. & Cress. 689, 13 Eng. C. L. 394; Cowell v. Edwards, 2 B. & Pull. 268; Beaman v. Blanchard, 4 Wend. 432, 435; Story's Eq. Juris. § 496; 1

Chitty on Cont. (5th Am. Ed.) 597, 598; Willard's Eq. Juris. 108. There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity and when they are parties to the action. The action here was not of this character; nor were all the proper parties before the court. It was clearly an action at law, and in that point of view, as we have seen, the plaintiff could only recover for one-fourth of the debt for which all the sureties were liable. The distinction between the two classes of actions is recognized by the decisions.

The remedies, the parties, and course of procedure are each different. In the one a jury trial is a matter of right; while in the other the trial is by the court. The costs are also in the discretion of the court. Code, §§ 253, 306; 13 N. Y. 498, supra. As the judgment could not require each of the parties to pay his aliquot share and furnish a remedy over against those who were insolvent and the rights of the parties be finally determined and fixed, it was under the facts proven clearly erroneous. Although in many cases under the Code the pleadings, if necessary, may be made to conform to the facts, and the case disposed of upon the merits, the defects here are so radical as to strike at the very foundation of the action, and cannot thus be remedied. Besides, the proper parties are not before us, and cannot be brought in, except on motion in the court below. As the claim was alleged in the complaint, there was no such defect of parties apparent as required the defendant to take the objection by demurrer or answer.

It follows that the judgment must be affirmed upon the plaintiff's appeal, with costs of appeal to be paid by the plaintiff upon the final termination of the action, if the defendant succeeds; and if the plaintiff succeeds, to be set off against the plaintiff's costs. And the judgment must be reversed upon the defendant's appeal, with costs of the appeal in this court, and costs in the Supreme Court to abide the event.[4]

WILKINSON & CO. v UNWIN.

(Court of Appeal. 1881. 7 Q. B. Div. 636.)

Action upon two bills of exchange drawn by the plaintiffs on and accepted by Edwin Unwin, the one for £51. 13s. 4d. at three months, and the other for £60. at four months.

At the trial it appeared that Edwin Unwin had requested the plaintiffs to supply him with goods, and to give him some credit for the

[4] Accord: Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413 (1907.)

price of them by taking bills of exchange, and it was agreed between the plaintiffs and Edwin Unwin that he should procure his mother, the defendant, to indorse the bills as surety for the price of the goods. The plaintiffs accordingly supplied the goods and drew and indorsed the bills sued upon, and the defendant indorsed them to the plaintiffs. It was alleged for the plaintiffs that the defendant indorsed the bills with the intent of thereby becoming surety for the due payment of the bills; for the defendant it was alleged that she indorsed the bills in the ordinary way and to the ordinary extent incident to an indorsement, and without any intention to forego any rights or remedies ordinarily incident to an indorsement. The bills of exchange were dishonored at maturity, and the plaintiffs were unable for some time to find the defendant's address, but on finding it they gave her notice of dishonor.

The jury found that the plaintiffs had shown due diligence in trying to find out the defendant's address, and to give her notice of dishonor; that the defendant did not put her name on the bill with the ordinary intention, but that she had agreed with the plaintiffs to become surety to them for the price of the goods supplied to Edwin Unwin, and put her name on the bill to become surety to the plaintiffs; and that no payment on account of the bills had been made by the defendant.

Bowen, J., gave judgment for the plaintiffs.

The defendant appealed.

BRAMWELL, L. J. I think that this judgment must be affirmed. It has been established that if the indorser of a bill of exchange subsequently becomes the indorsee, he can maintain no action against the intermediate indorsers, because he would himself be liable to them by reason of his antecedent indorsement. But there are several other cases which have decided that, if the holder of the bill would not be liable to the indorser whom he is suing by reason of any previous indorsement of his own, he may enforce his claim because no circuity of action arises; the holder of the bill may always show such circumstances as do away with any liability by reason of his previous indorsement. That has been established by numerous decisions. Notwithstanding Mr. Fullarton's argument, I have no doubt that this action is maintainable. It is alleged by the plaintiffs that the bills of exchange sued on were indorsed by the defendant with the intention of becoming surety for the price of goods supplied to Edwin Unwin. The defendant has alleged that she indorsed the bills in the ordinary way and without any intention to forego her remedies against the plaintiffs as indorsers. The jury have found that the defence to the action is untrue, and they have said that she intended to make herself liable. It is clear that upon this finding she could not have maintained any action against the plaintiffs, if they had indorsed away the bills of exchange sued upon, and if the indorsees had compelled the defendant to pay the amount. It has been argued by Mr. Fullarton,

that the agreement relied upon by the plaintiffs must be proved by a memorandum in writing because the contract is one of suretyship. The contract, however, is not within the words or the reason of the statute of frauds. If the buyer of goods accepts a bill drawn upon him for the price by a surety who afterwards indorses it to the seller, the surety cannot refuse to pay the amount upon default of the principal debtor, because the agreement under which the bill was signed was not in writing. The liability of the defendant cannot be explained away in the manner suggested. The only difficulty, which I have felt, is that some expressions in the opinions of the Lords in Steele v. McKinlay, 5 App. Cas. 754, may be inconsistent with the reasoning of my judgment in this case; but I am satisfied that it was not the intention of the House of Lords to overrule either the three English cases which have been mentioned, namely, Wilders v. Stevens, 15 M. & W. 208, Smith v. Marsack, 6 C. B. 486, and Morris v. Walker, 15 Q. B. 589, or the two cases decided in the Supreme Court of New York, Seabury v. Hungerford, 2 Hill (N. Y.) 80, and Hall v. Newcomb, 3 Hill (N. Y.) 233.

Baggallay, L. J. In this case the question arises upon the judgment entered upon the findings, and it is not now disputed that the findings are correct. The defendant is an intermediate indorser, and the position of the parties when there has been a reindorsement is thus described in Byles on Bills (12th Ed.) p. 155, c. 11: "If a bill be reindorsed to a previous indorser, he has, in general, no remedy against the intermediate parties for they would have their remedy over against him, and the result of the actions would be, to place the parties in precisely the same situation as before any action at all. But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser." The object of the rule of law is to prevent a circuity of action. Prima facie, when the holder of the bill is likewise a previous indorser, no action can be maintained; but then, as has been pointed out in the work which I have cited, certain exceptions exist to the general rule. Wilders v. Stevens, 15 M. & W. 208, Smith v. Marsack, 6 C. B. 486, and Morris v. Walker, 15 Q. B. 589, are instances of these exceptions. I think that what Mr. Fullarton has pointed out with respect to them is very important. They were all cases decided upon the pleadings, and this creates a difference between them and Steele v. McKinlay, 5 App. Cas. 754. In that case all the facts were before the House of Lords, and it was held that a written contract was necessary. I was much impressed by the argument which has been addressed to us, and under other circumstances there might be great force in the contention that the agreement put forward by the plaintiffs is not in writing; but I think that the defendant is precluded by the findings of the jury from raising the defence upon which she wishes to rely. They have found that she in-

dorsed the bills of exchange in order to make herself liable as surety for the debt due from her son.

Upon this ground, I think that the appeal must be dismissed.

BRETT, L. J. The verdict and the judgment have proceeded upon the ground that the defendant was an indorser, and if this were an ordinary case of indorser and indorsee, no doubt the verdict and the judgment would be right, for prima facie no consideration is needed to support an indorsement. However a difficulty was raised as to the plaintiffs' right to recover, and the objection was based on the ground that before the indorsement to the plaintiffs by the defendant the plaintiffs themselves had been parties to the bill. At first sight this seems a fatal objection; but the effect of the previous indorsement by the plaintiffs may be destroyed. In certain cases relating to mercantile law the objection to the right to recover was raised upon the pleadings; but circuity of action was negatived, and the moment that that is negatived the objection is destroyed. If it is shown that no consideration existed for handing the bill to the defendant, the circuity of action is taken away. In Morris v. Walker, 15 Q. B. 589, the objection was taken away by showing that the note was indorsed by the plaintiff without any consideration, and the indorsement was in fact for the accommodation of the defendant; therefore all objection on the ground of circuity of action was destroyed. It has been contended that the only evidence of a consideration was the defendant's promise to become a surety for her son, and that as this promise was not in writing the indorsement was not binding upon the defendant. But the plaintiffs are not suing upon a guarantee; the case is not within either the words or the spirit of Statute of Frauds, § 4. Moreover, verbal evidence of the consideration was admitted, and the complaint ought to have been made to the High Court; but the objection was not sustainable, and the defendant has in truth lost nothing by the omission to apply to that tribunal. It has been contended that the cases which support the contention for the plaintiffs were wrongly decided, and that the law as laid down in Britten v. Webb, 2 B. & C. 483, must in all cases be applied. But it seems to me that Britten v. Webb is quite distinguishable from the decisions which support the contention for the plaintiffs. It has been argued that Steele v. McKinlay, 5 App. Cas. 754, shows that when all the facts are proved at the trial it becomes necessary to give evidence of an agreement in writing; it seems to me that that case has nothing to do with the present. It was there held that the mere fact of a person writing his name on the back of a bill does not make him acceptor, when the names of other parties appear as acceptors. This point does not affect the question before us. When this case was tried before Bowen, J., he acted upon the principles of the law merchant, and I am of opinion that his judgment was quite right.

Judgment affirmed.

PIERCE v. MANN.

(Supreme Judicial Court of Massachusetts, Middlesex, 1835. 17 Pick. 244.)

Assumpsit on the common money counts, and on a special count against the defendant as a promisor, on a note as follows: "East Sudbury, June 27, 1832. For value received of Horace Heard I promise to pay him or his order $446.65 in ninety days from date. Peter Rice." On the back of the note were the names of Horace Heard and Samuel H. Mann; the name of Mann being below that of Heard. The plaintiff called Heard as a witness, who testified that before and at the date of the note he held a note against Rice and Mann, made by them as joint and several promisors; that there was due thereon the sum for which the note declared on was given; that he called on Rice for payment, and Rice, at Wayland, wrote and signed the note now in suit and delivered it to the witness; that the old note was then given up to Rice; that Mann, on the next day, at Boston, put his name on the back of the new note, and it was in this state delivered to the witness for the purpose of procuring the money on it at the Brighton Bank; that the witness offered the new note at the bank, but the bank declined discounting it; that the witness, being indebted to the plaintiffs, offered this note to them in payment, and they agreed to take it if the witness would indorse it; that he accordingly put his name upon it; that nothing was then said about the place where his name should be written on the back of the note, and he did not know that it made any difference where he should put his name.

On this evidence a nonsuit was ordered, and if the court should be of opinion that the defendant was not liable either as original promisor or as guarantor of the note, the nonsuit was to be confirmed; otherwise a new trial was to be granted.[5]

Per Curiam. It is not necessary to consider the question, whether the parol evidence introduced by the plaintiff was admissible, for the facts testified do not show (and perhaps have no tendency to show) that the defendant was an original promisor or a guarantor. There was no request to him to sign as one or the other, but he put his name on the back of the note to enable the payee to get it discounted at the bank. It is not unusual in business for a third person to indorse a note before it is indorsed by the payee, who is to put his name upon it at the time when it is discounted. Here the plaintiffs agreed to take the note if Heard would put his name upon it, which he did, above the name of the defendant; and the plaintiffs must be understood to have taken it as a common indorsed note. The facts do not imply an authority to write a guaranty over the defendant's name.

Nonsuit made absolute.

[5] The arguments of counsel are omitted.

MECORNEY v. STANLEY.

(Supreme Judicial Court of Massachusetts, Worcester, 1851. 8 Cush. 85.)

This was an action of assumpsit on a promissory note, bearing date the 20th of December, 1848, payable to the plaintiff or order on demand, subscribed by John E. Stanley, and on which the defendant's name was indorsed in blank. The trial was before Hoar, J., in the court of common pleas.

The declaration contained four special counts, in the first of which the defendant was sought to be charged as an original promisor, and in the others as a guarantor. The consideration alleged in the three last counts was a forbearance to sue John E. Stanley.

It was in evidence for the plaintiff that the defendant, on the 19th of February, 1849, paid a part of the note; that at the time of making the payment he said that he had signed a note for his brother, John E. Stanley; that he had become surety for his brother to the plaintiff, who furnished him with goods and thereby helped him; that he, the defendant, was secured, and held a bill of sale or a mortgage of the goods and effects of John E. Stanley to secure him; and that the plaintiff was pressing him for payment.

The defendant then introduced evidence tending to show that he did not put his name on the note until the 14th of February, 1849. The defendant also put in evidence the deposition of Horace Mecorney, who testified that, in the latter part of February, or the early part of March, 1849, the plaintiff called on John E. Stanley to pay or secure a note which the plaintiff held against him; that John replied that he would try to get his brother Douglas, who was in the next room, to sign with him, and asked the plaintiff if he would accept of that, to which the plaintiff answered that he would; that John then went into the room where his brother was, and both came together, immediately, into the room where the witness and the plaintiff were; that the defendant then said to the plaintiff that if he would not ask him for payment, nor call on him for it in less than six months, he would sign with his brother; that the plaintiff then said he would not, and they made a writing to that effect, which the plaintiff signed; and that thereupon the defendant indorsed his name on the note.

The plaintiff, upon these facts, insisted that the defendant was liable on the first count in the declaration, if not on the others. But the judge ruled, and instructed the jury, that if the defendant did not put his name on the note at the time it was given, but at the time and in the manner stated in the deposition of Horace Mecorney, he was not liable on the first count, and that to sustain the three last counts it was not sufficient for the plaintiff to prove a forbearance to sue John E. Stanley, but that he must prove an agreement, binding upon the plaintiff, to forbear to sue John E. Stanley; that an agreement not to sue the defendant would not be sufficient; and that there seemed to be no suffi-

cient evidence in the case from which the jury could infer an agreement to forbear to sue John E. Stanley, leaving that question, however, to the decision of the jury.

The jury returned a verdict for the defendant, whereupon the plaintiff alleged exceptions.

BIGELOW, J. It is very clear that the plaintiff could not recover against the defendant on the first count charging him as an original promisor, because the evidence proved that the defendant's name was not put on the back of the note until several weeks after the note was given. Union Bank of Weymouth and Braintree v. Willis, 8 Metc. 504, 41 Am. Dec. 541; Benthall v. Judkins, 13 Metc. 265.

As the defendant did not partake in the original consideration of the note by becoming a party to it, at its inception, the plaintiff was bound to show a valid consideration for the undertaking of the defendant. For this purpose he relied on his three last counts, and offered evidence tending to show a forbearance to sue John E. Stanley, the original promisor. But it did not appear that there was any agreement to give time to the original promisor. On the contrary, his liability to pay the note on demand remained unchanged. The only consideration therefore for the defendant's promise was the pre-existing debt of John E. Stanley, with which the defendant had no concern. But a mere forbearance to sue, without any promise or agreement to that effect, by the holder of a note, forms no sufficient consideration for a guaranty. It is a mere omission on the part of the creditor to exercise his legal right, to which he is not bound by any promise, and which right he may at any moment and at his own pleasure enforce. There being in this case no agreement to forbear to sue, the creditor was not hindered or delayed. He could have brought his suit against the promisor at any time, so that he sustained no injury or inconvenience sufficient to constitute a consideration for the promise; and, on the other hand, the original debtor received no benefit or advantage whatever, because he was liable to be sued at any moment, and so the consideration fails as to him. There was no damage to the creditor or benefit to the debtor upon which the consideration of a promise can rest. It is not therefore true, as a proposition of law, that forbearance to sue a third person is, of itself, a sufficient consideration for a promise; and the court would have erred, if they had complied with the plaintiff's request, and given any such instruction to the jury. To constitute a forbearance to sue a third person a good consideration for a promise by a stranger to the original consideration, it must have been in pursuance of an agreement to forbear. In such a case, the injury to the promisee and the benefit to the debtor both concur in making the consideration valid. It is undoubtedly true, that an actual forbearance to sue may often, in connection with other facts, be evidence of an agreement to forbear, and, as such, form a good consideration for a promise. Walker v. Sherman, 11 Metc. 170; Breed v. Hillhouse, 7 Conn. 523. But this is a very different proposition from that

contended for by the plaintiff, that forbearance of itself, without any promise, is a good consideration. Byles on Bills, 90, note; Crofts v. Beale, 11 C. B. 172.

The exception, founded on the remark of the judge, as to the insufficiency of the evidence to prove an agreement on the part of the plaintiff to forbear to sue the original promisor, cannot be sustained. The question, whether there was such an agreement, was left by the court to the jury, who returned a verdict for the defendant; and although there may have been, upon the facts reported, sufficient evidence from which the jury might well have inferred such agreement to forbear, still the remark of the judge, being only a comment on evidence, forms no valid ground of exception. Davis v. Jenney, 1 Metc. 221; Mansfield v. Corbin, 4 Cush. 213. The remedy of the plaintiff, for any error in this respect, was by a motion for a new trial.

Exceptions overruled.

ESSEX CO. v. EDMANDS et al.

(Supreme Judicial Court of Massachusetts, Suffolk, 1858. 12 Gray, 273, 71 Am. Dec. 758.)

Action of contract against the Lawrence Carpet Company, the executors of the will of John Raynor, and Samuel G. Wheeler, as joint promisors of three promissory notes payable to the plaintiffs, signed on their face by the company, and on the back, before delivery, the first "John Raynor, Samuel G. Wheeler," and the other two "Samuel G. Wheeler, John Raynor." The corporation was defaulted. The other defendants answered that they were liable as indorsers only.

At the trial the defendants offered to prove that the real agreements between the plaintiffs and Raynor and Wheeler, under which they wrote their names upon the back of the notes, was that the plaintiffs should receive the notes from the Lawrence Carpet Company, indorsed by Raynor and Wheeler, and that Raynor should be first and Wheeler second indorser on the first note, and Wheeler first and Raynor second indorser on the other two; that they were not joint promisors on either note; and that the notes had not been so protested for nonpayment as to charge indorsers. They also offered to prove these facts by the mortgage given at the same time with the notes, as a part of the same contract, and to secure their payment. But Thomas, J., ruled that Raynor and Wheeler, having signed said notes at their inception and before their delivery, were joint promisors thereon, and that the evidence offered could not vary that liability, and directed a verdict for the plaintiffs. The defendants alleged exceptions.[6]

SHAW, C. J. There is nothing to take this case out of the usual and long-established rule, though perhaps, if a new question, it would be fairly open to argument.

[6] The arguments of counsel are omitted.

The position which we think is settled in Massachusetts is that, if one not the promisee indorses his name in blank on the note, before it is delivered to take effect as a promissory note, the law presumes that he intends to give it credit by becoming liable to pay it in some capacity and on some terms. One natural legal result might have been presumed to be that he intended to be liable as second indorser; but this has long been held otherwise, and is now settled otherwise by authority. He cannot be held in the capacity of first indorser; for he is not payee, and no one but the promisee can be first indorser and put the note in circulation. If it be said he may, if he chooses, take upon himself the limited obligation of an indorser, the answer is, so he may, if he so expresses it before signing it, but not otherwise. If it be said that signing in blank leaves it equivocal whether he means to assume the obligation of promisor or indorser, and that the law makes no presumption on the subject, then the contract would be a contract between the holder and such indorser requiring evidence aliunde to show which was intended, and that would make it in effect a parol contract to pay the debt of another and void by the statute of frauds.

But it is intended when the blank is filled to have the character of a written instrument, and not to depend on parol proof to give it effect, and not to be altered or contradicted by parol evidence. The law does presume, and it is a strict legal presumption, that such indorser did intend to be liable in some form and to some extent. It does not charge him as indorser, though his name is on the back, unless by express terms. The case of an indorsement in blank supposes that there are no such express terms; therefore it must be either as promisor or guarantor. To that extent it is equivocal. But this does not leave it open to the holder to insert the one or the other contract over the name as he pleases. There are other considerations applicable to the subject.

The peculiar character of a contract of guaranty is that it is an independent contract between the holder of the note and the guarantor; it must be upon separate consideration. He is not a party to the note. Such guaranty may be on the note, or made by a separate instrument; but in either case it is upon a distinct consideration. Therefore, if the note was thus indorsed in blank, after it was delivered by the promisor to the promisee, it could not be a contract made upon the original consideration of advancing the money on the note, and participating in the same consideration with the promisor. He cannot therefore be held as promisor; he cannot be held except as guarantor. To hold him in the latter capacity a distinct consideration must appear.

Being a blank indorsement, of course no consideration appears on the face of it; but if it was put on after delivery, an instrument so indorsed in blank authorized the holder to go into proof of the fact which such blank shows was intended to be supplied. It may be proved by parol testimony that there was a consideration as between the holder and guarantor, and what that consideration was, and the blank filled accordingly.

It follows therefore that in determining whether such blank indorsement constitutes an original promise in which the person giving it is held as one participating in the original consideration of the loan, or whatever it was, on which the promisor was bound, it is important that it should appear whether the name of such blank indorser was on the note when it was delivered by the promisor to the promisee. If it was not, the conclusion of law is that he was not a joint or original promisor. If it was, then the conclusion of law equally attaches that he was an original promisor.

The question of the delivery of a note must necessarily be a question of fact. It is something which occurs after the contract has been completely written, and it cannot appear on the note itself. A note, like a deed or other written instrument of contract, takes effect from its delivery. Fay v. Richardson, 7 Pick. 91.

It is said in some of the cases that if a note is produced by a holder, having the blank indorsement of one not the payee, the presumption is that it was on when he took it. And perhaps it may be so, as the presumption is that a note was made and delivered at its date. But this is a presumption of fact, and may be rebutted by proof that it was not so on the note when delivered, on which question of fact the case is for the jury and open to proof on both sides.

This view in some measure indicates the nature and the extent of the parol evidence which may be given in such case. It is always competent to give parol evidence of the fact whether the blank indorsement was made before or after the delivery of the note. If it is proved as a fact that the name was on before it was delivered to the promisee, it is conclusive of the legal character and effect of the contract, and parol evidence is not admissible to control such legal effect. But if the fact is proved that it was made after delivery to the promisee, parol evidence is admissible to prove a separate consideration to give it effect as a guaranty. Perhaps it is impossible to prescribe any exact rule as to the extent of such parol evidence. Some things, we think, are clear. Some parol evidence may be admitted to show the time and circumstances under which it was made and delivered. Samson v. Thornton, 3 Metc. 275, 37 Am. Dec. 135. On the contrary, it would not be competent to show that the agreement was that the words "without recourse" should be written over the party's name. That would contradict the legal presumption that he intended to give credit to the note by binding himself in some form—which cannot be done. Precisely what are the limits it may be difficult to say before the cases arise.

It seems to be agreed on all hands that the matter to be filled up by parol evidence must be consistent with the writing as far as it has gone. The ground on which any power of filling up a blank is warranted is that the party, by delivering an instrument in blank, consented to such filling up. Smith v. Crooker, 5 Mass. 538. Of course it must be something consistent with the contract when delivered, and does not extend

to the insertion of matter inconsistent. For instance, it has been said that the delivery of a blank note, with a name written across in the usual place of indorsement, would warrant the holder to fill it up on the other side with a note for any amount, payable to him who had thus left his name in blank. So suppose this written on a stamp, where stamps are required, it would not warrant an amount larger than the stamp would cover. So if a note be filled and signed, leaving a blank for the number of dollars, it would be a letter of credit for any amount covered by the stamp.

The question whether the promisee was surety or principal is a question between themselves only, and does not affect the rights of the holder.

It has been argued that the case of Riley v. Gerrish, 9 Cush. 104, expressed a different view of the law as to the admission of parol evidence from that which had been laid down in Chaffee v. Jones, 19 Pick. 263, Union Bank v. Willis, 8 Metc. 509, 41 Am. Dec. 541, Howe v. Merrill, 5 Cush. 80, and other previous cases. That case was left to the court on certain testimony of Mr. Hancock, so far as it was admissible. The decision was certainly right. There were words erased, and it was held that parol evidence was competent to prove that they were stricken out before the note was delivered, with a full understanding of the effect of thus erasing the words "as indorser." It is there stated that "this power of filling up the blank is not arbitrary, but depends upon proof of the real negotiation." It would have been more accurate to say: "Proof of the fact that it was signed before or after delivery; and, if after, then it would be competent to prove the consideration and an authority to fill the blank with words constituting a contract of guaranty." Another material consideration in that case was that the proof tended to show that it was an original contract between the promisee and such special indorser, and so was open to any and all questions respecting want and legality of consideration, which it would not have been if sued by an indorsee having taken it in the due course of business and not dishonored. It had been recently held in the case of Howe v. Merrill that, when a party had signed in due order as indorser, parol evidence was not admissible to show that he was bound as promisor. In the more recent case of Wright v. Morse, 9 Gray, 337, 69 Am. Dec. 291, in the opinion given by Mr. Justice Dewey, some expressions in Riley v. Gerrish were set right.

Describing the notes in the mortgage as "indorsed" is a description of the notes simply to identify them; it was literally true, they were notes with the names of the defendant written on the back.

Exceptions overruled.

MOORE v. CROSS.

(Court of Appeals of New York, 1859. 19 N. Y. 227, 75 Am. Dec. 326.)

Appeal from the Supreme Court. The complaint averred the making of a promissory note by the defendant McGervey, payable to the order of the plaintiff, and that it was indorsed by the defendant Cross for the purpose of paying for coal sold and delivered by the plaintiff to McGervey on the credit of such indorsement, and was delivered, thus indorsed, to the plaintiff, with the privity of Cross, in payment for coal then sold and delivered. Upon the trial before a referee the complaint was proved in substance, and he reported in favor of the plaintiff. The judgment thereupon entered was affirmed on appeal at General Term in the First District, and the defendant Cross appealed to this court.

JOHNSON, C. J. This action is upon a promissory note made by one McGervey, payable to the order of James Moore, and indorsed in blank by John A. Cross, James Moore, and John McNamee. The plaintiff is the James Moore to whose order the note is payable. It was proved that, upon a negotiation for a sale of coal by Moore to McGervey, Moore agreed to sell him the coal for his note, indorsed by Cross, and that for this purpose Cross indorsed the note. The sale accordingly took place, and the coal and the note indorsed by Cross were respectively delivered. The note was discounted for Moore at the Atlantic Bank, and being unpaid at maturity was duly demanded and notice duly given to Cross. It was subsequently taken up at the bank by Moore, the plaintiff. The question is whether, on this state of facts, Moore can recover in this action against Cross.

It is quite conceivable that, in the ordinary course of business, a promissory note may, before it falls due, come to the hands of a person who already appears upon it as payee or indorser. In such a case he cannot maintain an action against any of the parties whose indorsements are subsequent to the first appearance of his name. The legal reason is that each of those persons, on paying to him the note, would have an immediate right to demand payment from him on his earlier indorsement. The law, to avoid this circuity, denies an action to a party thus situated. If the note had passed through his hands without indorsement, or if it had been indorsed without recourse by him, the reason would not exist; and there could be no objection, founded on his prior holding or indorsement, to the maintenance of an action by him against the parties liable on the note.

Again, if a note be made and indorsed for the accommodation of A., who indorses it to another person, and afterward, in the course of trade, again becomes the holder, he could maintain no action against the maker and indorser for his accommodation, notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the

action, and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing. This, in principle, is very like what the plaintiff seeks to maintain in this case. Having brought his action as holder, and producing the paper indorsed in blank, he has prima facie made out a title as such; and to rebut the inference which arises on the face of the paper, that a recovery by him against Cross, would only lead to a new recovery by Cross against him, he shows that the defence of circuity is not available against him, inasmuch as Cross could have, by the original agreement of the parties, no recovery against him. The case is, as to its legal merits, the same as if Cross had taken up the paper from the bank and brought an action against Moore as payee, and in such a case no one could doubt the competency of the proof of the facts now in proof, or their conclusiveness to defeat Cross's action. Labron v. Woram, 1 Hill, 91. Between parties thus standing in immediate privity with each other, an action could no more have been maintained by Cross against Moore than it could had Moore been strictly an accommodation indorser for Cross.

When this note was originally in Moore's hands the blank indorsement of Cross could have been rendered entirely conformable to the real agreement and object of the parties by Moore's making his own indorsement without recourse in terms. Upon such an indorsement the paper would no longer have afforded a prima facie answer to Moore's action against Cross, nor could Cross have maintained that such an indorsement was unwarranted, as it would have exactly carried out the intention of the parties. Between these parties I can see no reason why the indorsement might not thus have been made at the trial, or why it may not now, being a mere matter of form and the right to make it being proved, be treated as made.

Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guaranty and charging the indorser as a maker or guarantor. This doctrine was advanced in Herrick v. Carman, 12 Johns. 160, and was adjudged in Nelson v. Dubois, 13 Johns. 175, and Campbell v. Butler, 14 Johns. 349. It was attacked in Dean v. Hall, 17 Wend. 214, and in Seabury v. Hungerford, 2 Hill, 80, and was finally overthrown in Hall v. Newcomb, 3 Hill, 233, and the same case in error, 7 Hill, 416, 42 Am. Dec. 82. The Chancellor, in his opinion in the latter case, says: "If the object of the second indorser was to enable the drawer to obtain money from the payee of the note, upon the credit of the accommodation indorser, he may indorse it without recourse, and, by such indorsement, may either make it payable to the second indorser, or to the bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser." He proceeds to say that the party might proceed on the common counts, giving a

copy of the note and indorsements, but that he must, in either case, show demand and notice to charge the indorser. In Spies v. Gilmore, 1 N. Y. 321, the doctrine came before this court under slightly different circumstances. Want of demand and notice were held to be excused upon the circumstances of the case, in the Superior Court. In this court it was discussed and decided on the question of the sufficiency of the excuse; and not an intimation is to be found throwing any doubt upon the position that, had those defects not existed, the plaintiff might have recovered. The later cases of Brown v. Curtiss, 2 N. Y. 225, Hall v. Farmer, 2 N. Y. 553, and Durham v. Manrow, 2 N. Y. 533, being upon writtten guaranties, and not upon indorsements, are not applicable to this case.

The cases of Herrick v. Carman, 10 Johns. 224, and 12 Johns. 159, and Tillman v. Wheeler, 17 Johns. 326, are entirely in harmony with this view. In neither of them was it made to appear that the second indorser put his name on the paper to give the maker credit with the payee. On that ground each of them was decided, while the whole scope of the opinions shows that with that proof the court would have sustained a recovery. The case of Waterbury v. Sinclair, 16 How. Proc. 329, sustains the general position of the plaintiff, as do the opinions of Mr. Justice S. B. Strong and Mr. Justice Emott, though the decision of the former was overruled upon the ground that there should have been an actual indorsement without recourse. It seems to me that, under the present system, if a right so to indorse appears, and it may be done even at the trial, that substantial justice is promoted by regarding it as done and looking upon its actual doing as the merest matter of form.

The recovery was founded on correct legal principles. The fact that an indorsement without recourse would present exactly such a case as might frequently happen in the transaction of business, and if so happening would strike no one as violating the ordinary theory of promissory notes, shows that the real rights of these parties are capable of being enforced without violence to any rule of law, under the contract they have actually made.

All the Judges concurring, judgment affirmed.

PHELPS v. VISCHER.

(Court of Appeals of New York, 1872. 50 N. Y. 69, 10 Am. Rep. 433.)

Appeal from order of the General Term of the Supreme Court in the Third Judicial Department, reversing a judgment in favor of defendant entered upon the report of a referee and ordering a new trial.

The action was brought upon a promissory note made by Scudder & Redfield, dated May 15, 1867, payable to the order of James E.

Brown, and before delivery to Brown indorsed by Solomon Bennet, defendant's testator. Before the note fell due Brown transferred the note to one Hine, and Hine transferred it to plaintiff absolutely, without condition, before due, for value paid at the time in money.

At the time of the transfer to the plaintiff the note had on it the following indorsement of Brown written above Bennet's indorsement:

"For the purpose of making this note negotiable I indorse the same, payable to the order of Solomon Bennet, without recourse to me as indorser. James E. Brown."

The referee found "that, at the time of such transfer to the plaintiff, he knew nothing of any defense to the note"; also, "that said plaintiff had notice, before he purchased the note, that the indorsements made by the said Brown upon the note were made after it passed into the hands of Brown, with Bennet's indorsement upon it," and decided that the plaintiff could not recover.

Judgment was entered, upon the report of the referee, in favor of the defendant. Further facts appear in the opinion.[1]

GROVER, J. The order of the General Term does not state that it was made upon any error of fact. It must, therefore, be assumed by this court that the judgment was reversed and a new trial granted upon legal errors only. An exception was taken by the respondent to the finding by the referee of the fact that the plaintiff had notice, before he purchased the note, that the indorsements made by Brown upon the note were made after it had passed into the hands of Brown with Bennet's indorsement upon it. This exception raises the question in this court whether there was any evidence in support of the finding. The plaintiff, in his testimony, speaking of these indorsements, says: "I can't say when they were put on; it was done—that is, both of these instruments signed by Brown—during the negotiation of the sale of the note to me. Hine brought all the notes to me to sell them to me." The witness has before testified that he purchased several other notes of Hine at the same time he bought this. Other testimony shows that Bennet's indorsement was put upon the note a long time before the purchase by the plaintiff. It follows that when the plaintiff first saw the note it had been indorsed by Bennet and not by Brown. This sustained the material part of the finding. Whether the note had been in Brown's hands was not material; but, if so, that fact might be inferred from the testimony. This brings us to the real question in the case, which is whether the legal conclusion of the referee, from the facts found, that the plaintiff was not entitled to recover against Bennet, was correct. The substance of the facts so found is that Scudder & Redfield made the note in suit payable to the order of James E. Brown, and, after being indorsed by the defendant Bennet, was by them delivered to Brown the payee; that the note, before maturity, was transferred by Brown to one Hine, and by Hine, before due, trans-

[1] The arguments of counsel are omitted.

ferred to the plaintiff absolutely, without condition for a valuable consideration; that at the time of the transfer to the plaintiff he knew nothing of any defense to the note; and that it then had on it, in addition to the indorsement of Bennet, the following indorsement, made by Brown, written above the indorsement of Bennet, viz.: "For the purpose of making this note negotiable I indorse the same, payable to the order of Solomon Bennet, without recourse to me as indorser;" and the following, written below the indorsement of Bennet: "For value received of Isaac N. Hine I hereby guarantee to the said Hine, or bearer, the collection of the within note of the makers, and Bennet, the indorser," signed by Brown; that the plaintiff had notice, before he purchased the note, that the indorsement made by Brown upon the note was made after it had passed into the hands of Brown with Bennet's indorsement upon it. There would, at first view, appear to be an inconsistency between the finding that the plaintiff, at the time of his purchase, knew of no defense to the note, and the one, in substance, that he did, at that time, know that the note, after being made and indorsed by Bennet, was, by the maker, delivered to Brown, who, after that, made his indorsements upon the note, provided the latter finding constituted a defense for Bennet upon the note, as held by the referee. Be this as it may, full effect must be given to this latter finding upon the same principle that a general verdict is controlled by a special finding of fact. From this finding it appears that the plaintiff did know that the note had been indorsed by Bennet before Brown made the special indorsement thereon.

This presents the questions whether Brown, had he retained the note, could have recovered against Bennet as indorser; and if not, whether he could transfer any such right to a purchaser from him. In Herrick v. Carman, 12 Johns. 159, it was held that the payee of a note, made payable to his order, and indorsed by a third person previous to its delivery to the payee, could not recover against such indorser; that the face of the paper showed that the payee occupied the position of first indorser as to the one previously indorsing, and could not, therefore, be permitted to recover against one in the position as to him of second indorser. In Herrick v. Carman, 10 Johns. 224, it was held, upon a like note, that the party who had so indorsed might, in an action against him by an indorser of the payee, show that the plaintiff held the note as agent of the payee, and that this fact would defeat a recovery for the reason that the payee, as to the defendant, stood in the position of first indorser, and could not therefore recover of him. In Tillman v. Wheeler, 17 Johns. 326, the same rule was held and applied in deciding the case. It may be remarked that in each of these cases it appeared that the payees received the notes from the makers for value, pursuant to an agreement by the maker to give notes with an indorser; but it was held that this fact was of no avail to the plaintiffs, unless it was further proved that the person indorsing did so with intent to become surety for the makers to the payees. It is

clear that a party having no right of action upon a note himself can transfer none to another knowing all the facts.

In the present case the plaintiff not only himself knew the facts, but the case shows that they were also known to Hine, of whom he purchased the note. In Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326, the doctrine of the above cases was approved; and it was further held that in case the payee of a note, indorsed by a third person before delivery to him, averred and proved that it was the intention of the indorser to become surety of the maker to him upon the note, and that he indorsed the same for that purpose, he could maintain an action and recover upon such indorsement. There is no intimation that the action could be maintained in the absence of such proof. In Bacon v. Burnham, 37 N. Y. 614, it was held that where a person indorsed a note, payable to another or order, the legal presumption was, from the face of the paper, that he stands in the position of a subsequent indorser to the payee, and that in the absence of proof, showing him in a different position, the payee could not recover against him, and, further, that, the payee having no right of action, none could be acquired by transfer from him. This is decisive of the present case.

The counsel for the respondent invokes the rule that the right of a purchaser of negotiable paper is not impaired unless he has such knowledge of the equities between the original parties as to make his purchase dishonest. It is obvious that this does not include defenses apparent upon the face of the paper, but such only as are dependent upon the proof of other facts. In the present case the plaintiff knew that Brown had not indorsed the paper without recourse to Bennet, but that the latter had indorsed it, payable to the order of Brown. The plaintiff must be assumed to have known that, in the absence of proof that Bennet indorsed with the intention of becoming security for the makers to Brown, Brown could maintain no action against him upon the indorsement, and, having no such right himself, could not transfer it to another except upon assuming the responsibility of first indorser as to him; that the transfer of the note by Brown otherwise was a fraud upon Bennet. Had the plaintiff purchased the note of Hine without the knowledge that Bennet first indorsed the note, and that Brown's indorsement was made thereafter, the case would have come within the rule insisted upon by counsel. The plaintiff, in the absence of such knowledge, might have supposed that Brown first specially indorsed the note to Bennet, and that he subsequently indorsed, and that Brown's guaranty was made still later, upon some other arrangement. Under such circumstances the plaintiff would have been a bona fide holder.

The cases cited by counsel, where notes, not negotiable, were indorsed before delivery, have no application. But in these it was proved that the indorsements were made with the intention of becoming security for the makers to the payee. In Dean v. Hall, 17 Wend. 214, where it was held that the indorser could only be made liable when

properly charged as such, and not as maker, the additional views found in the opinion are entirely predicated upon the assumed fact that the indorser put his name on the back at the time the note was made, according to a promise to become originally and directly responsible, or was privy to the consideration of the note. Penny v. Innes, 1 Crompton, Neeson & Roscoe, 439, cited by counsel, was a case upon an indorsement of a bill of exchange, and the indorser was held liable upon the ground that the indorsement was equivalent to the drawing of a new bill by the indorser upon the drawee. If this be so the judgment was correct, as the drawer of a bill is liable to the payee unless it is paid by the drawer, and the proper steps are taken to charge him. This case has been criticised. See Gwinnell v. Herbert, 5 A. & E. 436.

But it is unnecessary to determine in this case whether the point was well decided or not, as the reason of the decision has no application to the indorsement of a note payable to the order of the payee. As we have seen already, the law is settled in this state that such an indorser is not liable to the payee upon the face of the paper, and can only be made so by proof, showing that he indorsed with intent of becoming so liable. Bennet could not be made liable as the maker of a new note, but only as indorser. Hall v. Newcomb, 3 Hill, 233; same case in error, 7 Hill, 416, 42 Am. Dec. 82; Brown v. Curtiss, 2 N. Y. 225.

The judge at General Term fell into the error of supposing that the facts set out in the complaint, bringing the case within the principle of Moore v. Cross, were admitted in the answer. The answer explicitly denies that the defendant Bennet indorsed with intent to become liable as surety to the payee.

The order of the General Term must be reversed, and the judgment entered upon the report of the referee affirmed, with costs.

PAHLMAN et al. v. TAYLOR.

(Supreme Court of Illinois, 1874. 75 Ill. 629.)

This was an action of assumpsit, brought by Allan H. Taylor against Herman J. Pahlman and D. G. Rush. The opinion of the court states the facts of the case. The defendants bring the record here by appeal.

SCHOLFIELD, J.[8] This was an action of assumpsit, by appellee against appellants as guarantors of a promissory note executed by one Charles Welsh to appellee, on the 13th day of June, 1870, payable 14 months after date, for $5,000, with interest at the rate of 10 per centum per annum. Appellants' names were indorsed in blank before the note was delivered, and the first question presented is: Did they thereby assume the liability of guarantors, or only that of successive indorsers?

[8] Part of the opinion is omitted.

The decisions of the Supreme Court of Indiana, referred to by appellants, seem to sustain the position for which they contend but in so far as they do so, they are in conflict with previous decisions of this court. It is there held that an indorsement in blank of an instrument not negotiable, made at the date of the contract, and unexplained by extrinsic evidence, confers upon the payee authority to hold the indorser liable, on the original contract, as surety, but that a similar indorsement of negotiable paper renders him liable only as indorser, with the ordinary rights and privileges incident to that character.

Promissory notes are made, by our statute, negotiable instruments, yet this court has never held, where they were indorsed by a third party before delivery, in the absence of an agreement to that effect, that the rule recognized by the Indiana cases applied to them.

Bogue v. Melick, 25 Ill. 93, also referred to by counsel, is not in point. In that case the note was executed by the firm of Dorsett, Bro. & Co., of which firm Folsom Dorsett, the payee of the note, was a member. It was then indorsed in blank by Folsom Dorsett and Abr'm Melick. Under this state of facts it was said by the court: "Here the payee of the note is also one of the makers. It was impossible, therefore, that the defendant put his name upon the note for the security of the payee, which is indispensable to create a suretyship. All the parties knew that the note, while in the hands of the payee, was a mere nullity—without vitality—creating no right or liability whatever. It could never become an operative instrument except by the indorsement of the payee. He would then become the first indorser, and his name would precede that of the defendant."

In the present case, appellants are neither makers nor payees of the note. They are merely indorsers in blank before delivery.

Appellants' plea, verified by affidavit, imposed upon appellee the burden of proving the liability of the defendants in the capacity in which they are sued. We think these facts are sufficiently proved by the evidence in the record: (1) That appellants' signatures on the back of the note are genuine. (2) That they were placed there before the note was delivered. (3) That there was no agreement between the parties, at or before the indorsement was made, as to what character of liability appellants thereby assumed. (4) That the note did not, at any time, pass to either of the appellants by assignment, nor was either of them, at any time, the holder thereof.

The legal conclusion from these facts is, we think, clear. Commencing with Cushman v. Dement, 3 Scam. 497, and running through a series of cases down to and including Lincoln v. Hinzey, 51 Ill. 435, this court has uniformly held that where the name of a person, not a party to a note, is indorsed upon it before delivery, the presumption is, in the absence of evidence to the contrary, that he indorsed as guarantor, and the rule thus declared has been too long and too firmly adhered to, to be now changed, unless it shall be done by legislative enactment. In our opinion, the evidence before us utterly and entirely fails

to show that the parties intended, by the indorsement, a liability other or different than that which the law would imply from the act under the circumstances.

We fail to appreciate the force of the argument of counsel, that although Pahlman may be considered as a guarantor, yet that the liability of Rush can only be that of a second indorser. Who, then, was the first indorser in this sense? No names are indorsed, save those of Pahlman and Rush, and, so far as we have been able to discover, they occupy the same relation precisely to the note. The money borrowed by Welsh, for the payment of which the note was given, was ostensibly for the firm of Pahlman & Co., which firm was composed of Pahlman, Rush, and Welsh. The interest of one was the interest of all, and this fact materially strengthens the legal presumption, if indeed any is needed, that the parties intended that appellants should be Welsh's sureties for the payment of the note. * * *

Judgment affirmed.

FAR ROCKAWAY BANK v. NORTON.

(Court of Appeals of New York, 1906. 186 N. Y. 484, 79 N. E. 709.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 8, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, C. J. The action is brought on a promissory note made by one Smith to the plaintiff, which the defendant indorsed prior to its delivery to the payee. But two questions are presented on this appeal.

First. It is alleged the referee committed error in excluding evidence offered by the defendant to show that Smith, the maker, had, some time subsequent to the maturity of the note, a sufficient deposit in the plaintiff bank to pay it, which the plaintiff failed to appropriate for that purpose. The case of National Bank of Newburgh v. Smith, 66 N. Y. 271, 23 Am. Rep. 48, is a conclusive authority to the effect that, in the absence of any direction or agreement to that effect, it was optional with the plaintiff whether it would apply the money or not upon the note in suit, and that it was under no positive legal obligation to do so. Therefore there was no error committed in this respect.

Second. The note was given in renewal and to take up an earlier note, also indorsed by the defendant. To establish the fact that the defendant had indorsed the note with the purpose of giving the maker credit with the payee, proof was given tending to show that, default having been made in the payment of the earlier note, notice of protest thereof was given to the defendant. It is urged that the evidence as to the protest of the earlier note was not of a proper character. It

is unnecessary to consider this question, for since the enactment of the negotiable instruments law (Laws 1897, p. 719, c. 612) the law obtaining in the case of such indorsement as that made by the defendant has been radically changed. Prior to that time the indorser was presumed to be a second indorser, and not liable to the payee, though it was competent for the payee to prove aliunde that the intention of the indorser was to give the maker credit with the payee. Bacon v. Burnham, 37 N. Y. 614; Coulter v. Richmond, 59 N. Y. 478. Section 114 of the negotiable instruments law prescribes a different rule. It is enacted that "where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: "(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties." This note was made in December, 1898, and therefore the proof offered by the plaintiff was not necessary to maintain its cause of action, and the error, if error there was, was immaterial.

The judgment appealed from should be affirmed, with costs.

DEAHY v. CHOQUET et al.

(Supreme Court of Rhode Island. 1907. 28 R. I. 338, 67 Atl. 421, 14 L. R. A. [N. S.] 847.)

Assumpsit on promissory note. Heard on exceptions of plaintiff, and overruled.

DOUGLAS, C. J.[9] A few days before June 5, 1901, the defendant Choquet, being desirous of borrowing some money, called, with defendant Carroll, upon the plaintiff, and asked him for a loan upon a proposed note. The plaintiff offered to lend the money if the note should be indorsed by reliable persons. On June 5th Choquet, accompanied by Carroll, called again and offered to the plaintiff a promissory note in the words and figures following:

"$1,800.00 Pawt., R. I., May 29, 1901.

"Three months after date I promise to pay to the order of Joseph H. Beland eighteen hundred 00/100 dollars at the Ind. Trust Co., Pawt. Branch. Value received. Ambrose Choquet."

Upon the back of the note were signatures:

"J. H. Beland.
"Hugh J. Carroll.
"Hugh J. McGinn."

The plaintiff examined the note and approved it, whereupon Carroll wrote at the bottom, after the printed word "Due," the words and figures: "Sept. 5, '01. Money advanced June 5, '01"—and the plain-

[9] Part of the opinion is omitted.

tiff took the note and gave to Choquet his check for $1,737, deducting from the face of the note $63 for three months' interest.

No presentation of the note was made at the bank, either three months from its date or three months from June 5th. No notice of dishonor was ever given to the parties whose names are upon the back of the note.

This action was begun by a writ of attachment dated January 7, 1904, which was served January 25th by attachment of real estate of defendant Carroll and personal property of defendant Choquet and by summons of defendants Beland and McGinn. All the defendants answered, and certain special pleas having been overruled on demurrer, trial upon the general issue was begun December 5, 1906, and ended December 7th by a verdict, by direction of the court, against the defendant Choquet and in favor of the other defendants.

The verdict in favor of the defendants Beland, Carroll, and McGinn was directed on the ground that they were indorsers and released from liability by failure of the holder to make due presentment for payment of the note and to give them notice of the dishonor, as well as on the ground that the agreement referred to was an extension of time given to the maker within the meaning of section 128, subd. 6, Neg. Instru. Act.

We think the direction should be sustained.

Article 1, § 3, of the negotiable instruments act (chapter 674, Pub. Laws), provides that: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

Article 6, § 71, of the same act, provides that: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

The defendants named come within the plain language of these sections, and there is no evidence that they made any agreement to vary their liability.

They all affixed their names to the note, before delivery, for the accommodation of Choquet, to whom the plaintiff directly paid the money for it, knowing that they were such accommodation indorsers. As such they were entitled to notice of the dishonor of the note by sections 97 and 111, art. 8, c. 674, which they never received.

It is urged, however, by the plaintiff that all these defendants became liable to him as joint makers because he would not have taken the note if their names had not been upon it, and in regard to defendant Carroll, that there was an express waiver by him of presentment and notice.

The claim that the indorsers are liable as makers because the plaintiff required good indorsers before he would discount the note is the height of absurdity. If it were valid every indorser whose name was

of any value would be held as a maker. The principle which the plaintiff mistakes as applicable to this case is well stated in the case which he cites—Equitable Marine Insurance Co. v. Adams, 173 Mass. 436, 53 N. E. 883. In that case the company assented to the assignment of a policy of insurance on condition that the assignee should indorse the premium note, which of course had been made and delivered at the time the policy was issued. The court held that Pub. St. Mass. c. 77, § 15—"Every person becoming a party to a promissory note payable on time, by a signature in blank on the back thereof, shall be entitled to notice of nonpayment the same as an indorser"—does not refer to a collateral contract made subsequent to the issuing of a note and upon an independent consideration, even if it happens to be indorsed upon the note instead of being written upon a separate piece of paper. The case of Downey v. O'Keefe, 26 R. I. 571, 59 Atl. 929, holds the familiar doctrine, which prevailed in Rhode Island until the operation of the negotiable instruments act, that one not the payee of a note, who indorses it or agrees to indorse it before its issue, is liable as a joint maker. Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179, and Leonard v. Wildes, 36 Me. 265, are to the same effect. This doctrine has no validity since the passage of section 71 of the negotiable instruments act.

In the case at bar the note was issued when the plaintiff paid the maker a consideration for it, and there is no evidence of any consideration being paid to the indorsers or of any agreement with them other than that expressed by their signatures upon the note. By indorsing the note they assumed the obligation of successive indorsers to become effectual when it came into the hands of a holder for value. This obligation was released by failure to make presentment and to give notice of dishonor, and the plaintiff has no claim upon them unless they have waived their rights as indorsers. There is no claim that Beland and McGinn ever did so, and the verdict in their favor must stand.
* * *

Plaintiff's exceptions are overruled, and the case is remanded for judgment on the verdict.[10]

[10] In accordance with the doctrine of the two preceding cases, under sections 63 and 64 of the negotiable instruments law, one who indorses an instrument before delivery to the payee is liable as indorser (Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413 [1907]; Gibbs v. Guaraglia, 75 N. J. Law, 168, 67 Atl. 81 [1907]), and not as guarantor (Farquhar Co. v. Higham, 16 N. D. 106, 112 N. W. 557 [1907]), nor as joint maker (Baumeister v. Kuntz, 53 Fla. 340, 42 South. 886 [1907]; Rockfield v. Bank, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. [N. S.] 842 [1907]; Thorpe v. White, 188 Mass. 333, 74 N. E. 592 [1905]; Quinby v. Varnum, 190 Mass. 211, 76 N. E. 671 [1906]; Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455 [1906]; McLean v. Bryer, 24 R. I. 599, 54 Atl. 373 [1903]; Nat. Bank v. Lubrano, 29 R. I. 64, 68 Atl. 944 [1908]; see, also, Peck v. Easton, 74 Conn. 456, 51 Atl. 134 [1902]; Downey v. O'Keefe, 26 R. I. 571, 59 Atl. 929 [1905]; Leonard v. Draper, 187 Mass. 536, 73 N. E. 644 [1905]), to the payee and subsequent holders (McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000 [1898]; Corn v. Levy, 97 App. Div. 48, 55, 89

SECTION 2.—PRESENTMENT FOR ACCEPTANCE

BRIGHT v. PURRIER.

(London Sittings, 1765. Buller's N. P. 269.)

A foreign bill of exchange was drawn, payable at 120 days after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial the defendant objected that he was not liable till the expiration of the 120 days, and offered to call evidence to prove that the custom of merchants was such. But Lord MANSFIELD said the law was clearly otherwise, and refused to hear the evidence. So the plaintiff recovered.

ROSCOW v. HARDY.

(Court of King's Bench, 1810. 12 East, 434.)

The plaintiff, as indorsee, sued the indorser of a bill of exchange for £50. dated Manchester, 4th January, 1810, and stated it to have been drawn by J. and P. Walmsley, at three months after date, in favor of R. Kirk or order, on Messrs. Shaw and Edwards, Walbrook, London, and indorsed by Kirk to the defendant, and by the defendant to the plaintiff. At the trial at Guildhall before Lord Ellenborough, C. J., the bill, when produced, had eleven other indorsements upon it; and it appeared that it was in the possession of the Warrington Bank when it was tendered for acceptance on the 23d of January, and refused to be accepted; but it did not appear that the Warrington bankers had given any notice of the dishonor at the time to any person; but as soon as the bill was due, they again tendered it for payment; which, being refused, they called upon the plaintiff for payment; and he, not knowing any of the circumstances, took the bill up, and then called upon the defendant; who, being apprised of the dishonor on the 23d of January, refused payment; alleging his discharge by the laches of the then holders. And upon proof of these facts the plaintiff was nonsuited.

N. Y. Supp. 658 [1904]; but see Kohn v. Consolidated Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265 [1900]).

One who irregularly indorses a bill for the accommodation of the acceptor before its delivery to the payee is liable to the payee. Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136 (1908). Contra: Steele v. McKinlay, 5 App. Cas. 754 (1880); Jenkins v. Coomber, [1898] 2 Q. B. 168. Compare Glenie v. Smith, [1908] 1 K. B. 263.

Topping moved to set aside the nonsuit, and contended that the plaintiff ought not to be prejudiced by the laches of the subsequent holders of the bill, of which he was wholly ignorant at the time when he paid it, and without any means of information. The bill apparently came back to him in due course of time, and there was nothing apparent upon the face of it by reference to its date to raise the suspicion of a diligent man that it had been presented for payment and dishonored two months before, nor anything to impeach his want of due diligence in obtaining knowledge of that fact; and without that knowledge he could not have defended himself against an action on the bill by the Warrington bankers. Then no laches being imputable to himself, or apparent upon the face of the bill when paid by him, he ought not to be debarred from his remedy over.

Lord ELLENBOROUGH, C. J. If the indorsers on the bill be once discharged by the laches of the holder at the time in not giving due notice of the dishonor of it, their responsibility cannot be revived by the shifting of the bill into other hands.

LE BLANC, J. It is admitted, that the fact of the dishonor on the 23d of January, and the want of due notice, would have been a good defense to the plaintiff against the Warrington bankers, if he had been apprised of it at the time of the demand made upon him; and that such laches was also a discharge to the other indorsers. How then can it change the liability of those other indorsers, who perhaps might have known the fact, and had a legal defense to the action, if payment had been then demanded of either of them by the Warrington bankers, that those bankers first called upon one of the indorsers, who happened not to know of their laches?

The other Judges assenting,

Rule refused.

O'KEEFE v. DUNN et al.

(Court of Common Pleas, 1815. 6 Taunt. 305.)

This was an action brought against the defendants, as the drawers of a bill of exchange drawn on Ricketts & Co., at one month after date, payable to Sinclair, and by him indorsed to the plaintiff, for the nonacceptance of the bill by Ricketts. The defendant pleaded, that before the indorsement to the plaintiff, and presentment by her for acceptance, the bill was presented by Sinclair for acceptance and refused, and that the defendants had no notice given them of such refusal to accept. After verdict for the defendant on this issue joined on a traverse of this plea, Vaughan, Serjt., for the plaintiff, who at the trial before Gibbs, C. J., at the sittings at Guildhall after Hilary term, 1815, proved the facts of his declaration as above stated, in Easter term obtained a rule nisi to enter up judgment for the plaintiff non obstante

veredicto, upon the ground that the special plea averring no notice to the plaintiff of the first dishonor of the bill, was insufficient in law.[11]

DALLAS, J., stated the case, and proceeded as follows: Two points seem to be clear, first, that a bill payable at a future day, or so many days after date, need not be presented for acceptance, but may be demanded, without such presentment, when due. Secondly, that if, however, presentment be made, and there be a refusal to accept, notice of such refusal ought to be given by the party to whom it was made; and that for the want of such notice, as between the drawer and such holder of the bill, the drawer will be discharged; if, therefore, this bill had continued in the hands of Sinclair, the payee, to whom the refusal to accept was made, and by whom no notice of such refusal was given, the drawer, as to him, would have been discharged; but the action is not brought by Sinclair, but by the plaintiff to whom he had indorsed the bill, and without notice by him to her that the bill had been refused acceptance. The question then will be, whether she can stand in a situation different from that in which he would have stood if he had brought the action. On the part of the defendants it is argued, that there is no distinction; and this is contended, first, upon the reason of the rule by which the drawer would be discharged against a party knowing of the refusal to accept and omitting to give notice; secondly, on the authority of a decided case, which is said not to be distinguishable from the present. And first, as to the reason of the rule, the drawer is presumed to have effects in the hands of the drawee, and the bill is an order to appropriate so much to the payee or his order. If, therefore, on presentment the drawee refuse to accept, from the very nature of the transaction, the drawer should have notice, that he may withdraw his effects, or proceed against his debtor, as the case may seem to him to require. But if he have no effects, the reason of the rule fails, and with it the rule; and in such event, notice is not necessary.

Now it has been contended, that this rule cannot vary by the shifting of hands, for that the drawer is equally injured by the want of notice, in whatever hands the bill may be; and further, that when the drawer is once discharged, his responsibility cannot be revived by the acts of others independent of him. With respect to the first part of the statement, it may be admitted to be true; but with regard to the latter, it is begging the question; for the question is, if this responsibility have ever ceased as to a party in the situation of the plaintiff. Or rather, whether the defendants have not agreed so to be responsible in the events which have happened in the present case. The inquiry, therefore, must be, whether an indorsee for a valuable consideration, and without notice of any illegality not making the bill void in its origin, or of any laches in the course of its circulation, is to be considered as receiving a bill subject to all that might affect it in the hands of the

11 The arguments of counsel, the concurring opinions of Gibbs, C. J., and Heath, J., and the dissenting opinion of Chambre, J., are omitted.

payee, or of a previous indorser, or, in other words, may not the drawer be discharged as to the payee becoming indorser and yet continue liable to his indorsee? The nature of the contract appears to me to be this: The drawer of the bill payable at a future day enables the payee, by making the bill payable to him or to his order, to hold out to all the world, that he will pay the bill, in default of the acceptor, to the party entitled to present it for the acceptance or payment. He does not stipulate for himself that it shall be presented for acceptance, nor does the law cast such an obligation on the payee. The drawer, therefore, must be considered as contented to rest in ignorance whether it has been accepted or not, till the bill becomes due. And whether presented or not, depends upon the casualty of how the holder of the bill may choose to proceed. Any party who takes it, paying a valuable consideration, takes it, then, knowing that presentment for acceptance is not necessary, and nothing appearing upon the face of the bill to show it to have been presented and acceptance refused. Indeed he has reason to conclude the contrary in every case in which there is no noting for nonacceptance, which noting would be notice on the face of the bill, and under such a circumstance he would act at his peril. Taking it, therefore, before it becomes due, and ignorant of a refusal to accept, he is a purchaser for a valuable consideration, without notice, against a party who has enabled the indorser to put off an instrument, good upon the face of it, and by which, as far as appears, he has contracted to be bound. And considered in this light, I am of opinion, that from the very nature of the contract he is entitled to notice from the party having knowledge of the refusal to accept, and is discharged for want of such notice; but that he must be taken to have stipulated that this rule shall be confined to such party, and not be extended to an innocent and ignorant indorsee.

On the reason and convenience of the thing, this doctrine appears to me to be equally supported. It can do no harm to the circulation of bills of exchange, that the holder should be required, when acceptance is refused, to give immediate notice to the drawer, and that the consequence of a neglect to do it should devolve upon himself; but it would greatly clog the negotiability of such securities, if, upon some latent defect, and without any default in himself, every man shall be taught, and so be made to feel, that in the moment of paying the full value of a bill, he may be purchasing that which may turn out to be a mere nullity. This has hitherto been confined to two or three special cases, and ought not, I think, to be further extended; and I will only add, that in what I am now saying, I mean such bills as the genuine purposes of commerce require. It may be said, this may be guarded against by ascertaining, before taking the bill, whether it has been refused acceptance or not, and this is certainly possible, but for reasons that must be obvious, would in practice be so inconvenient, as almost to amount to a prohibition to take any unaccepted bill. As to cases in point, I am not aware of any which are directly so, and will

consider, therefore, next, how the law stands in these which appear to me to be analogous. And first, in the instance of a bill indorsed over after it becomes due. That it is overdue, and has not been paid, appearing upon the face of it, is notice to the party who takes it, and being therefore out of the common course of negotiability, he is bound to inquire into the cause, and taking it without such inquiry, is subject to all the equities that would have affected it in the hands of former parties. This rests on the ground of knowledge in him, or that which is equivalent to knowledge, a fact amounting to notice, and demanding inquiry; but reverse the fact, and suppose it a taking by indorsement before it became due, he is then an innocent indorsee, without notice of fraud or neglect, and entitled to recover against all those parties. who under the circumstances of the case might be discharged as to each other. A drawer may therefore be released as to the payee, and yet continue liable to the last indorsee. And this appears to me in principle to apply to the present question.

It remains only to advert to the case cited from Roscow v. Hardy, 12 East, 434, and though said to be in point, I think it is clearly to be distinguished from the present. The facts were these: The bill had been presented by the Warrington bank, and acceptance refused. They gave no notice to the drawer at the time, nor to the party from whom they had taken it; but kept it till due, and then, without notice to the indorser, who was ignorant of these facts, recovered against him, and when he sued the drawer, the drawer was held to be discharged, and the indorser to have paid the money in his own wrong, inasmuch as undoubtedly the bank would not have recovered against him. The difference therefore between the two cases is this: In the case cited, the bill had never passed into the hands of an indorsee ignorant of the refusal to acccept before the bill became due, and while it was fairly negotiable, but remained till it became due in the hands of those, who, from neglect to give notice, could not recover. Whatever was a discharge to the drawer, was a discharge to the indorser; and the discharged indorser having thought fit to pay, when not liable, could not recover against the drawer what he had paid in his own wrong. In this case the fact is directly the reverse; the bill when becoming due, being in the hands of an innocent holder, and having been taken in a course of fair negotiation during the period that intervened between the refusal to accept and the bill arriving at maturity for payment. For these reasons I am of opinion in every view of the case, that this plea is not a sufficient answer to the action.

Rule absolute.

GOUPY et al. v. HARDEN et al.

(Court of Common Pleas, 1816. 7 Taunt. 159.)

This was an action brought against the defendants as indorsers of two bills of exchange, for £400. and £600. drawn on 12th May, 1815,

by De Franca & Co. upon Gould Bros. & Co., merchants at Lisbon, at 30 days after sight, payable to the defendants, and by them indorsed to the plaintiffs, who were merchants at Paris, and who indorsed the bills to Ricci & Sons, merchants at Genoa, who also negotiated the bills. The bills were presented to Goulds for acceptance, on the 22d August in the same year, when they were refused, and protested for nonacceptance; but were accepted by Montano, under protest, for the honor of Ricci & Co. The bills were again, on 20th September, when due, presented to Goulds for payment, which was also refused, and a protest made, and Montano paid them for the credit of Ricci & Co., whereby the plaintiffs were obliged to pay the amount of the bills, with costs, charges, interest, exchange, and re-exchange. Upon the trial of this cause, at the sittings in London after Trinity term, 1816, before Gibbs, C. J., it appeared that the plaintiffs, had employed the defendants, who were merchants in London, for a commission of one half per cent., to procure in London, and transmit to them to Paris, bills on Portugal for £1,000. The plaintiffs accordingly purchased upon the Exchange the bills in question, and having specially indorsed them to the plaintiffs, transmitted them to Paris; the plaintiffs indorsed them to Ricci & Sons, merchants at Genoa, who further negotiated them. On the 15th of July, De Franca failed. Goulds had paid bills drawn on them so late as the 30th of June, 1815. On the 12th of October, the plaintiffs by letter apprised the defendants of the dishonor of the bills, and in a subsequent letter stated that they should certainly have sooner sent forward the bills for acceptance, had they not relied on the defendants' guaranty. The defendants contended, first, that they, having indorsed these bills to the plaintiffs only as their agents, were not liable on that indorsement. Evidence was given that when agents indorse foreign bills for the mere purpose of transmitting them, without intending to incur responsibility for the payment, it is their practice to add to the indorsement the words "sans recours"; that these words however, implying a doubt in the mind of the indorser of the stability of some of the parties, injure the credit of the bills, and therefore are usually omitted, if a confidence exists between the parties, although it is nevertheless intended that the agent should not be responsible for the goodness of the bills; and the defendants contended, that such was the course of dealing in the present instance, as evinced by the low rate of commission which the defendants were to receive. The defendants also contended that they were discharged by laches; for that the bills ought to have been sooner presented to the drawee for acceptance, and not sent round from Paris to Italy, by which the presentment for acceptance, and consequently the period of payment, had been many months delayed; and if the bills had been presented for acceptance in the beginning of June, they would have been payable before Goulds ceased to honor the drawers' demands, and before the drawers themselves had become insolvent. The jury, however, found a verdict for the plaintiffs; which

Lens, Serjt., now moved to set aside, on the grounds, first, that an agent, under these circumstances, was not liable upon his indorsement; next, that the presentment of a bill payable at, or a certain time after sight, could not be protracted to an indefinite or unreasonable period without discharging the parties.

GIBBS, C. J. This is an action brought against the indorser of two bills at 30 days' sight; and the verdict is for the plaintiffs. Objections are made to their right to recover, on two grounds: First, that though the bills were indorsed by the defendants, the defendant, under the circumstances, is not liable on his indorsement. Secondly, that there has been laches in not presenting the bills for acceptance within a shorter time. As to the first objection, here is an unqualified indorsement. It is not proved that the plaintiffs knew that the defendants were connected with the bill otherwise than as agents; but if they had known it, and I will take it in the strongest way, that they knew the defendants were acting only as agents, still they had a right to consider, that in this transaction the defendants were liable as indorsers; and they may justly say, as they have done: "We should have sent forward these bills for acceptance, unless we had seen your names on them, which placed the respectability of the bills beyond a question; otherwise we should have sought the security of the drawee."

But this leaves the second objection untouched. If these bills had been locked up and not sent into circulation, the case would have been widely different. I know dicta may be found, that a bill payable at sight must be presented within a reasonable time; but this very question occurred in this Court in the case of Muilman v. De Eguino, 2 H. Bl. 565, bills were sent out to India, and one question was, whether they were presented for acceptance within a reasonable time in India, and it was held that they were; but the main question was, whether they were delayed too long in Europe, before they were sent out. Upon the last point, Eyre, C. J., says: "There would be a great difficulty in saying at what time such a bill should be presented for acceptance. The courts have been very cautious, in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance; and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. I do not see how the courts can lay down any precise rule on the subject." Heath, J., says: "No rule can be laid down as to the time for presenting bills drawn payable at sight or a given time after." The jury have found that these bills were presented in a reasonable time, but the law prescribes only that they must be presented at some time. Buller, J., is still stronger, and lays down the rule only that the bill must be put into circulation. In the present instance, these bills were put into circulation, and they passed through Paris and Genoa. He proceeds to say: "If they are circulated, the parties are known to the world, and their credit is looked to, and if a bill drawn at three days' sight were kept out in that way

for a year, I cannot say there would be laches. But if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches." I am therefore clearly of opinion that the parties were not guilty of laches in putting this bill into circulation, before it was presented for acceptance.

DALLAS, J. The defendants might have specially indorsed this bill sans recours, if they had thought fit so to do, but they have not done it.

The rest of the court concurred in refusing the application.

TANNER v. BEAN.

(Court of King's Bench, 1825. 4 Barn. & Cr. 312.)

Assumpsit on a bill of exchange. The declaration stated that one Challenger made his bill of exchange and directed it to one Masters, that Masters upon sight thereof accepted it, that Challenger indorsed it to the defendant, who indorsed to the plaintiff. Averment that the bill was presented for payment and dishonored, and notice given to the defendant. Plea, non assumpsit. At the trial before Littledale, J., at the London sittings, after Easter term, the plaintiff proved that the bill was drawn by Challenger and indorsed by him and the defendant, and that it was dishonored, but he failed to prove that it was accepted by Masters. It was thereupon objected that the plaintiff could not recover, for that he was bound to prove the acceptance of the bill according to the allegation in the declaration, although that allegation was unnecessary. The learned judge overruled the objection, and directed a verdict to be found for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

Chitty now moved accordingly, and renewed the objection taken at the trial, and cited Jones v. Morgan, 2 Camp. 474, where Lord Ellenborough held that where, in an action by the indorsee against the drawer of a bill of exchange, the declaration contained an averment of acceptance, the plaintiff was bound to prove it.

ABBOTT, C. J. The holder of a bill is not bound to present it for acceptance before it becomes due, and we are of opinion that the allegation of acceptance is not in the nature of a description of the instrument. The acceptance or nonacceptance does not vary the responsibility of the indorser appearing on the declaration; it is at all events his duty to pay the bill when due, if the prior parties do not. The averment of acceptance was, therefore, immaterial, and the plaintiff was not bound to prove it.

Rule refused.

FIRST NAT. BANK v. LEACH.

(Court of Appeals of New York, 1873. 52 N. Y. 350, 11 Am. Rep. 708.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, affirming a judgment in favor of defendant, entered upon a verdict.

This action was brought upon a check drawn by defendant. The check was drawn upon the Ocean National Bank, was dated November 21, 1871, for $1,410, payable on the 12th December, 1871, to the order of James Dolby. It was delivered to the payee and discounted for him by plaintiff. At 11 o'clock a. m. of the 12th December, plaintiff caused the same to be presented to the drawee for certification, and it was certified as good. The drawer had at that time on deposit sufficient to pay the check, and the amount thereof was charged to him. Within an hour or two thereafter the Ocean National Bank, the drawee, suspended, and a receiver was appointed, who took possession afterward. Upon the same day the check was presented for payment, and payment being refused, the same was duly protested.

Upon this state of facts the court directed a verdict for defendant, to which plaintiff's counsel duly excepted.[12]

PECKHAM, J. The defendant drew the check in controversy, it was discounted by the plaintiff, and on the day it was due[13] it was pre-

[12] The arguments of counsel are omitted.

[13] "I cannot assent to the proposition of the plaintiffs, that no demand was necessary in this case. When the action is against the drawer, who has drawn where he had no funds, nor any reasonable expectation that his draft would be paid by the drawee, he cannot object the want of seasonable demand and notice, because in such case he cannot possibly sustain damage from the want of presentment of the bill. Such, however, is not this case. This suit is brought, not against the drawer, but indorsers. The rule on this subject is well laid down by Mr. Justice Sutherland in Murray v. Judah, 6 Cow. 490: 'As a general rule, therefore, a check is not due from the drawer until payment has been demanded from the drawee and refused by him. As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time. But as between the holder and maker or drawer, a demand at any time before suit brought is sufficient, unless it appears that the drawee has failed, or the drawer has in some other manner sustained injury by the delay.' Between these parties a demand of payment from the drawees was clearly necessary. Nor can I assent to the proposition of the defendant that the check in question is a bill payable on the 14th January, and that therefore it is to be governed by the same rules as bills payable on a particular day. The check was both drawn and negotiated before its date, the effect of which is that it is payable on demand, on or after the day on which it purports to bear date, and nothing more." Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304, 307 (1833); s. c., 13 Wend. (N. Y.) 133, 27 Am. Dec. 192 (1834).

Accord: Gough v. Staats, 13 Wend. (N. Y.) 549 (1835); Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530 (1838); Stewart v. Smith, 17 Ohio St. 83 (1866); Frazier v. Trow's Co., 24 Hun (N. Y.) 281 (1881), affirmed 90 N. Y. 678 (1882). But a "check" which specifies on its face a future day for payment is a bill of exchange and not a check. Harrison v. Bank, 41 Minn. 488, 43 N. W. 336, 5 L. R. A. 746, 16 Am. St. Rep. 718 (1889). Contra: Way v. Towle, 155 Mass. 374, 29 N. E. 506, 31 Am. St. Rep. 552 (1892).

sented by plaintiff to the drawee, the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused, because between the time of its certificate and its second presentment the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check as between these parties?

The theory of the law is that, where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself.

The reason therefor is so strong that the law presumes it is adopted by the banks. Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Meads v. Merchants' Bank of Albany, 25 N. Y. 148, 82 Am. Dec. 331; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 69 Am. Dec. 678; Merchants' Bank v. State Bank, 10 Wall. 647, 19 L. Ed. 1008. It is found to have been done in this case.

If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to bona fide holders, whether it had funds or not. Farmers' & Mech. Bank v. Butchers' & Drovers' Bank, supra.

It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good.

For that reason, the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of that check. Hence, if the drawer should get the check back, he would strictly be entitled to get that money, not by virtue of his original deposit, but solely by surrender of the certified check, like any other holder.[14]

But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then, when the drawee accepts, it is an appropriation of the funds, pro tanto, for the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. Story on Bills of Ex. § 14; 1 Pars. on Notes and Bills, 323.

It is entirely clear that the acceptance of a time draft, before due,

[14] Accord: Schlesinger v. Kurzrok, 47 Misc. Rep. 634, 94 N. Y. Supp. 442 (1905).

does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says: "That check is good; we have the money of the drawer here ready to pay it; we will pay it now, if you will receive it." The holder says. "No, I will not take the money; you may certify the check and retain the money for me until this check is presented."

The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer.

The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations.

The acceptance of a time draft before due is entirely different; there the holder has then no right to the money, and the acceptor no authority to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such presentment, although the holder has the right to do it. The authority and the duty are to present for payment.

If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharging the drawer.

He cannot change the position and increase the risk of the drawer without discharging him. Smith v. Miller, supra.

This would not discharge the drawer of a check, who himself procured it to be certified and then put it in circulation. The reason of the rule fails to apply to him in such case.

I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the check.

The judgment must be affirmed.[15]

BORNE v. FIRST NAT. BANK.

(Supreme Court of Indiana, 1890. 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442. 18 Am. St. Rep. 312.)

ELLIOTT, J. On the 30th day of January, 1886, the appellant was indebted to the appellee, and after 12 o'clock noon of that day he delivered to it a certified check drawn by him on Ritzinger's Bank, in

[15] Accord: St. Regis Co. v. Tonawanda Co., 107 App. Div. 90, 94 N. Y. Supp. 946 (1905); Dunn v. Whalen, 120 App. Div. 729, 105 N. Y. Supp. 588 (1907); Blake v. Bank, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684 (1908), semble.

which bank he then had money on deposit. The banks of the city of Indianapolis had a long-established rule requiring all checks presented after 12 o'clock noon to be certified by the bank upon which they were drawn, and it was the well-known custom of such banks to immediately charge the checks certified by them against the depositor. This was done in this instance, and the amount of the check was set aside for the purpose of paying it. Ritzinger's Bank suspended payment, and made a voluntary assignment for the benefit of creditors, prior to the business hours of the first day after the check was delivered to the appellee.

We agree with the appellant's counsel that the drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes, in his hands, substantially a certificate of deposit. By his own act he makes the bank his debtor, and releases the drawer of the check. The reason for this rule is that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of the person who procures the certification of the check drawn in his favor. First Nat. Bank v. Leach, 52 N. Y. 350, 11 Am. Rep. 708; Thomson v. Bank, etc., 82 N. Y. 1; Girard Bank v. Bank of Penn. Tp., 39 Pa. 92, 80 Am. Dec. 507; Freund v. Importers', etc., Bank, 76 N. Y. 352. It is true that the bank by which the check is certified becomes bound for its payment, and that it cannot defeat the right of the holder upon the ground that the drawer has no funds on deposit. Espy v. Bank of Cincinnati, 18 Wall. 604, 21 L. Ed. 947.

But it is very clear that the authorities to which we have referred do not directly rule this case, for here the holder did not procure the certification of the check. All that it did was to accept the check in the ordinary course of business. Nor do we regard this case as within the sweep of the reasoning of the courts in the cases to which reference has been made. Here the holder accepted the check as it was offered, and did nothing to make the drawee its debtor. The principle which gives force and strength to the decisions referred to fails entirely where there is no act done by the holder of the check save that of receiving it in the form in which it is presented; for the element which sustains those decisions is that the holder, by procuring the certification of the check after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer. It is, in such a case, the holder's own act that changes the relation and situation of the parties.

The certification of a check does not completely change its character; on the contrary, it changes it only in one particular, although the change, it is true, does produce a difference in the relation of the original parties, inasmuch as the drawee ceases to be the debtor of the drawer for the amount represented by the check. But this is the extent of the change in the situation of the respective parties in all cases

where the certification is not procured by the holder of the check after it passes into his hands. It remains an order for the payment of money, and the certification, when made before delivery, operates in favor of third parties simply as an assurance that it is genuine, and will be paid. The bank that certifies it becomes bound, but beyond this nothing is added to the legal force or effect of the instrument, except, as we have said, in cases where the holder himself procures its certification.

The party who accepts a certified check in the usual course of business is not bound to take the risk of the solvency of the bank upon which it is drawn. He is bound only to do what the law requires, and that is to promptly and seasonably present the check for payment. A party to whom a debt is owing has a right to demand payment of his claim in money; for, in the absence of an express agreement, payment can only be made in money. Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396. In accepting a check instead of money, the creditor dispenses with the necessity of payment in the legal mode, and the reasonable implication is that the check shall be a payment only in the event that it is honored on presentation. To hold otherwise would, as the Supreme Court of the United States has suggested, seriously interfere with commercial and financial transactions, and break down an established system. Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008. Nor is there any rule of law which requires it to be so held. The analogies are, indeed, the other way; for, as only money is payment where there is no express agreement, there is no sufficient reason for inferring that an order for money, although accepted, is money, or has the same effect as money.

A bank upon which a check is drawn is not liable upon the check unless it is certified as good. Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805. The certification fixes the liability of the bank, but it does no more. It does not change the situation of the party who takes the check, nor does it make the check money. As it is not money, but is simply an accepted order for money, it does not, of its own force and vigor, operate as money. A certified check cannot take the place of money without an express agreement to that effect, and, therefore, cannot by its own intrinsic force operate as payment. To make it a payment, something must be added; and that something must be an agreement, express or implied, that it shall be regarded as money, the legal medium of payment.

The obvious purpose of certifying checks is to assure the persons to whom they are offered that they are genuine, and will be paid; not that the bank that certifies them is solvent. There is nothing in the nature of the transaction that suggests, in the faintest degree, that certification is evidence of the solvency and ability of the drawee. It is perfectly clear that the certification of a check means simply that the bank upon which it is drawn will honor it, and there is no reason for implying that one who receives it in the usual course of business does

so upon the faith that the certification implies that the bank is both willing and able to pay it. The certification is not intended to convey information as to the solvency of the bank. None of the parties can be regarded as giving it that force; and, if not, then it cannot be inferred that any of them agreed that the certification of the check impressed it with the character of money. We suppose that no one who accepts a certified check gives a thought to the question of the solvency of the bank upon which it is drawn other than such as he would give if there were no certification; for it would be unnatural and unreasonable to do so, inasmuch as the certification is, in terms and in implication, no more than an agreement that the check will be paid on presentation. It neither represents nor touches the question of the solvency of the bank upon which it is drawn. There is, therefore, no just reason for concluding that the party who takes a certified check in the ordinary course of business assumes the risk of the solvency of the bank chosen by the drawer of the check as his place of deposit. The fair and reasonable implication is that the party who selects for himself the bank which he will trust with his money assumes the risk of its solvency.

The certification of a check is not intended to convey to the person to whom it is offered an assurance that the bank upon which it is drawn is solvent; for there is nothing in the nature of the transaction, nor in the form of the contract, which authorizes the inference that any of the parties expected, or intended, that it should have that effect. It cannot, therefore, be implied that the acceptance of the check by the creditor, ipso facto, released the drawer, and imposed upon the creditor the risk of the solvency of the bank by which the check was certified.

It is, and long has been, settled law that an ordinary check does not constitute payment. This doctrine is so well settled that it is unnecessary to refer to the authorities. Accepting, as we must, this rule as obligatory, we cannot conclude that a certified check constitutes payment, unless we assume that the certification makes it the equivalent of money as a medium of payment. But neither in principle nor authority is there to be found warrant for this assumption; for, as we have seen, the nature of a check is not changed by certification, except in the one particular already indicated. As there is no other change, it is logically impossible that the effect of that change can make the check the equivalent of money.

From whatever point of view the question is examined, it appears clear that there is no release of the drawer of the check unless there is either an express or an implied agreement to that effect.

There is scant authority upon the direct question. The reason for this barrenness is that the use of certified checks is of modern origin. But, scarce as the authorities are, our conclusion that a certified check does not of its own force and vigor operate as a payment, is not without support from the decided cases. In Bickford v. First Nat. Bank,

42 Ill. 238, it was expressly decided that a certified check does not constitute payment. To the same effect are the decisions in Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; Mutual Nat. Bank v. Rotge, 28 La. Ann. 933, 26 Am. Rep. 126; Andrews v. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300. The question received consideration in the recent case of Larsen v. Breene, 12 Colo. 480, 21 Pac. 498, and it was held that a certified check was not a payment. This general doctrine is asserted by Mr. Tiedeman, who says: "And the same rule applies although the check had been certified before its delivery to the payee or holder; the certification only having the effect in that case of increasing its currency by adding the liability of the bank to that of the drawer." Tiedeman Com. Paper, § 456.

There was no substitution of one debtor for another, in this instance, and the contention of appellant's counsel that there was a novation cannot prevail. The delivery of the check was simply a conditional payment. The release of the original debtor was dependent upon the condition that the check should be honored on presentation. He still remained the debtor, for he was bound for the debt as long as the check remained unpaid. Culver v. Marks, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377.

Judgment affirmed.[16]

SECTION 3.—PRESENTMENT FOR PAYMENT

I. Day

BROWN v. HARRADEN.

(Court of King's Bench, 1791. 4 Term R. 148.)

This was an action on a promissory note by the indorsee against the indorser. The declaration stated that W. German on the 15th of September, 1789, made the note in question for £20. payable to the defendant or order on the 2d of November; it then deduced a title to the plaintiff, and averred a refusal to pay by the defendant on the 2d of November. The defendant pleaded a tender on the 5th of November. The plaintiff replied that he sued out a bill of Middlesex on the 4th of November, and that the defendant did not at any time before that day tender the £20., etc. Rejoinder that the bill of Middlesex was sued out on the 4th of November, and that before that time the defendant was not by force of the statute liable to pay, etc., nor did he promise to pay before, etc. Surrejoinder, that he did become liable

[16] Accord: Cullinan v. Union Surety Co., 79 App. Div. 409, 80 N. Y. Supp. 58 (1903).

by force of the statute before the suing out of the bill of Middlesex, and promised, etc. To this there was a general demurrer, and joinder.[17]

Lord KENYON, C. J. This question is of such infinite importance in every hour's transaction in the commercial world, that (I think) we should not discharge our duty to the public, if we were to keep this matter in suspense. And we are the more ready to deliver our opinion as this question is upon the record; for if our judgment be erroneous, it may be corrected by a superior tribunal. It is not necessary now to consider whether or not Lord Holt was right in so pertinaciously adhering to his opinion before the statute of Anne, that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the debt. That question exercised the judgments of the ablest men at that time; but the authority which his opinion had in Westminster Hall made others yield to him; and it was thought necessary to resort to the Legislature to apply a remedy. It is extremely clear that on foreign bills of exchange three days grace are allowed. I think it is as little to be doubted that they are also allowed on inland bills; and that observation is of some use as applicable to some of the authorities which have been cited. It is not too much to say that in former times, recently after the passing of the statute of Anne, this kind of questions were not so well understood as they have been since; the judges were not so conversant with the subject; but they have now raised a system to answer the exigencies of the public, without departing from the rules of law. But when it is stated in Lord Raym. 743, that there was no certain time assigned by the custom of merchants for the payment of inland bills of exchange, it only shows that the judges were very cautious on the subject; but now it has been settled for more than half a century that they are payable at the same time as foreign bills of exchange. Then it has been argued that there is a substantial difference between bills of exchange and promissory notes, and that there are reasons why the acceptor of the one should be allowed more time than the maker of the other; but I confess I see no difference whatever. They both make engagements of the same nature, and when the acceptor has accepted a bill, he is equally bound to be prepared to pay on the day appointed as the maker of the promissory note.

Then the ground, on which our judgment must proceed, is the statute of Anne; since which the holder of a promissory note may declare upon it according to the form of the statute, though not according to the custom of merchants. The words of the preamble ought to decide the question, which the common usage of mankind has since put into a state of repose. It recites that promissory notes were not assignable or indorsable within the custom of merchants, and that the

[17] The arguments of counsel, and the opinions of Ashhurst, Buller, and Grose, JJ., are omitted.

indorsee could not maintain any action upon them, within the custom of merchants; "therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as bills of exchange, and shall be negotiated in like manner," etc., it is enacted, etc. The struggle between the merchants and the courts of law before this statute was, whether the party could declare on these notes according to the custom of merchants; Lord Holt thought not. But this statute, which was passed at the instance of the merchants, has made them that which they were not before; and they are now, with the assistance of the statute, acted upon as if they had been within the custom of merchants. The operative part of the statute proceeds to say that such "notes shall be assignable and indorsable over in the same manner as inland bills of exchange"; that the holders may maintain actions on them in such manner as they might upon inland bills of exchange against the makers, or against the indorsees, in like manner as in cases of inland bills of exchange, etc. In short, they were wholly to assume the shape of inland bills of exchange. The case cited from Fortescue, indeed, is undoubtedly against our opinion; but that case was determined when the doctrine on paper currency was not so well established as it has been since, and it has been constantly contradicted by the uniform practice to this time, and by the courts of law. The case of Tindal v. Brown, 1 Term R. 167, is, in my opinion, very important. That case was argued several times in this court, and afterwards in the Exchequer Chamber; but this question was not even raised, though it would have been decisive, if well founded; and it was taken for granted in all the different stages of that cause that the laches of the holder did not commence until the expiration of the three days grace. Therefore on the act of Parliament, and on the authorities, I think we are warranted in deciding that the three days grace ought to be allowed on promissory notes as well as on bills of exchange, and consequently that the tender made by the defendant in this case is a sufficient answer to the plaintiff's action. In addition to these considerations we are now told that it has been the constant practice at the bank, and at the principal bankers, to make this allowance on promissory notes. Then if we were to make a decision in opposition to all this practice, it would be attended with the most serious consequences; for these notes are circulated not only throughout this country, but also over several other countries in Europe. Many of them have been discounted, and interest taken, on the supposition that three days grace are allowed; but, if we were to determine that no such allowance ought to have been made, all those parties would be involved in the crime of usury; and again all holders of notes, who made no demand on the makers till the expiration of the three days, and who afterwards resorted to the indorsers, will have been guilty of laches. Therefore I am glad to find that the later judicial determinations and the statute of Anne, which was passed for the purpose of putting

promissory notes on the same footing with bills of exchange, warrant the practice which has obtained in this respect, notwithstanding the former cases seem to be against it.

Judgment for defendant.

HART v. SMITH.

(Supreme Court of Alabama, 1849. 15 Ala. 807. 50 Am. Dec. 161.)

Error to the county court.

The facts of this case are fully shown in the opinion of the court.

Stone, for plaintiff in error.

T. J. Judge, contra.

1. Bills payable at sight, being different from those payable on demand (Chit. [9th Ed.] 410), should be presented for acceptance within a reasonable time, and before payment thereof be demanded. Chitty on Bills (10th Ed.) 274; Fernandez v. Lewis, 1 McCord (S. C.) 322. For (sight meaning acceptance) bills payable at or after sight do not become due until after they are accepted, or protested for non-acceptance. Brown v. Turner, 11 Ala. 752; Chitty on Bills (10th Ed.) 272; Stephen's N. P. 875, and authorities there cited. And, after acceptance, it is now well settled that such bills are entitled to days of grace. Chitty on Bills (9th Ed.) marg. pp. 409, 410; Chit. on Bills (10th Ed.) marg. pp. 376, 377, and note T, on page 377; Bailey on Bills (5th Ed.) 98; Forbes on Bills, 142; Janson v. Thomas, B. R. Trinity Term, 24 Geo. III; Dixon v. Nuttall, 1 C., M. & R. 307; Dehers v. Harriot, 1 Show. 163; Coleman v. Sayer, 1 Barnard, 303; Viner's Ab. tit. "Bills Ex."; 3 Dougl. 421; Selwyn's N. P. (9th Ed.) 351. In the case at bar, then the presentment for payment was premature, and a nullity. 1 Mason, 176; Wiffen v. Roberts, 1 Espinasse, 262; Brown v. Harraden, 4 Term R. 148; Griffin v. Goff, 12 Johns. (N. Y.) 423; Savings Bank v. Bates, 8 Conn. 505; Piatt v. Eads, 1 Blackf. (Ind.) 87. The authorities cited by plaintiff in error, showing it unnecessary to protest an inland bill, to authorize a holder to recover, have no application. There is a difference, between protest and notice.

DARGAN, J. This was an action of assumpsit, on a bill of exchange, drawn by the defendant, in favor of the plaintiff, on Desha & Smith, dated the 26th February, 1846, payable at sight. The only evidence introduced to charge the drawer was the bill, and protest, showing a demand of payment made of the drawees, on the 4th of March, 1846, and notice to the drawer. The court charged the jury that the plaintiff could not recover.

A bill, payable on demand, or at any fixed time, need not be presented for acceptance; but a demand of payment, at the time the holder has the legal right to demand payment, is all that is necessary.

And if the bill be not paid, the holder may protest it for nonpayment, and, on his giving due notice to the drawer and indorsers, their liability is fixed. Evans v. Bridges, 4 Port. 345; Bank of Washington v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Townsley v. Sumrall, 2 Pet. 170, 7 L. Ed. 386; Chitty on Bills (10th Ed.) 272. But when the time of payment is uncertain and a presentation of the bill is necessary, in order to ascertain, and fix, the time of payment, as if the bill be payable at a number of days after sight, then the bill must be presented for acceptance before payment is demanded. Story on Bills, § 112, 227; Chitty on Bills (10th Ed.) 272; Bayley on Bills (5th Ed.) 217, 218.

It is contended that a bill payable at sight is entitled to days of grace, and therefore it must be presented for acceptance before payment can be demanded.

I am free to confess that my opinion, untrammeled by authority, would incline me to hold that a bill of exchange, payable at sight, is not entitled to days of grace, and that payment may be demanded on presenting the bill, which, if refused, would authorize the holder forthwith to have it protested for nonpayment, and, on giving notice to the drawer, to hold him liable. But the law seems to be settled otherwise. Judge Story, in his treatise on Bills, says "that days of grace are allowed on all bills, whether payable at a certain time after date, after sight, or even at sight; and although there has been some diversity of opinion whether bills payable at sight are entitled to days of grace, it is now settled by the decisions, both in England and America, that days of grace are allowable on such bills." Section 342, p. 429. To the same effect, see Chitty on Bills (10th Ed.) 376; Bayley on Bills (5th Ed.) 244, 245; Selwyn's N. P. (9th Ed.) 351; Coleman v. Sayre, 1 Barnard, 303; Dehers v. Harriet, 1 Show. 165; Stephen's N. P. 876. Under the influence of these authorities, I feel constrained to hold that a bill payable at sight is entitled to days of grace; consequently, a demand of payment made of the drawer, upon the first presentation of the bill to him, is insufficient to charge the drawer, for the bill is not then due. As there was no evidence of any previous presentation of the bill for acceptance, nor notice given of nonacceptance, the demand of payment was prematurely made, and was therefore a nullity.

As the evidence fails to show a demand of payment on the day the bill was payable, the court correctly instructed the jury that the plaintiff could not recover.

Let the judgment be affirmed.

JEX v. TUREAUD.

(Supreme Court of Louisiana, 1867. 19 La. Ann. 64.)

ILSLEY, J. The administrator of the succession of the late Robert Many sues the defendant to recover from him as the indorser of the following described promissory notes, the several amounts thereof, with interest and costs:

(1) A note for $452, payable on the 1–4 January, 1862.
(2) A note for $2,400, payable on the end of March, 1862.
(3) A note for $452, payable on the 1–4 January, 1863.
(4) A note for $452, payable on the 1–4 January, 1864.
(5) A note for $5,650, payable on the 1–4 January, 1864.

The demand is resisted by the defendant, who, besides pleading the general issue, denies all liability as the indorser of the notes declared on, for the following reasons, viz.:

That the notes indorsed by him were not presented, and payment thereof demanded, at the time and place when and where they became due; that no diligence was shown by the plaintiff, or any previous holder of the said notes, in presenting them for payment, or in having them protested at the time and place of their respective maturity; that the notes could and should have been protested before the period at which the plaintiff states that protest was made, viz., on the 26th July, 1865.

The court below rendered judgment in favor of the plaintiff for the amount of the two notes, 4 and 5, maturing in January, 1864, but dismissed his action for those which were payable in the years 1862 and 1863, and from this judgment the defendant has appealed.

It is a settled rule of the commercial law that a demand should be made of the maker of a note on the very day on which by law it becomes due, and unless the demand is so made it is generally a fatal objection to any right of recovery against the indorser, although the maker himself may and will be liable on the note. This rule, although apparently harsh, and perhaps severe, in its practical operation, yet is, for the general purpose of business, highly useful to the commercial community by introducing promptness, fidelity, and exactness in the demand of payment. See Story.

There are, however, exceptions to the rule: "Any inevitable accident, or irresistible force, or unforeseen occurrence, which could not be provided against, will constitute a sufficient excuse for nonpresentment, etc., at the maturity of the note."

Such accident, irresistible force, or unforeseen occurrence must, however, be patent, real, positive, and, as a natural consequence, excuses derived from any such cause, vis major, as they arise with, and are dependent on, such cause, must also disappear with it.

The special grounds relied on by the plaintiff to bring him within the exception to the general rule in regard to the demand, etc., are:

(1) The presence of political circumstances and civil war, amounting to a virtual interruption of all ordinary negotiations of trade and intercourse with the state of Louisiana and the parish of St. James.

(2) The state of war between the northern and southern sections of the United States.

(3) The occupation of the state of Louisiana and the parish of St. James by Confederate forces, which suspended commercial intercourse and access to said parish and state.

(4) Public and positive interdictions and prohibitions of the United States and blockades, which obstructed and suspended commercial intercourse with the said state and parish.

(5) The absence of the late Robert Many from the state of Louisiana, and his sojourn, detention, illness, and death in the city of New York.

(6) The absence of civil, judicial, and ministerial officers, and the closing of their offices and of the courts of justice in the parish of St. James.

(7) The succession of Robert Many being unrepresented until the appointment of the petitioner as administrator, and his qualifications as such on the 26th July, 1865.

As regards the notes which matured in January of the year 1862 and 1863, we can perceive no reason why the judgment of the lower court, in regard to them, should be disturbed; for, supposing that Robert Many had these notes with him on his arrival in New York, in June, 1861, there was, from the time of the capture of New Orleans by the United States army in April, 1862, open, free, and uninterrupted communication by regular public conveyance between New York, New Orleans, and the parish of St. James; and as all that part of Louisiana, in which are situated New Orleans and St. James, were then and and continued to be "occupied and controlled by the forces of the United States," etc., commercial intercourse between New York, New Orleans, and St. James parish was by the proclamation of the President of the United States of July 1, 1861, not deemed unlawful, and did not become so until it was so declared by the proclamation of 31st March, 1863.

The office of recorder of the parish of St. James was filled until the 15th June, 1862. It was again in operation in December of that year, and was not afterwards vacated. There was then ample time to make demand of payment of the notes, which became due in January and March, 1862, and in January, 1863, as Robert Many died only on the 28th August of 1863, retaining all his mental vigor until the time of his demise.

It was not necessary that the demand should have been made, nor notice of demand and nonpayment given, by a notary. These requisites might have been performed and proved by any person lawfully in possession of the notes, and competent to testify as a witness. See

Lathrop v. Lawson, 5 La. Ann. 238, 52 Am. Dec. 585, Follain v. Dupre, 11 Rob. 454, Waldron v. Turpin, 15 La. 552, 35 Am. Dec. 210, and Burke v. McKay, 2 How. 71, 11 L. Ed. 181.

The two notes due in January and March, 1862, could not have been presented for payment to the drawer at the time and place of their respective maturity, but a demand should have been made, etc., as soon after as was practicable. Pothier, Fouté du Contrat de Change, partie 1, c. 5, § 144.

No valid excuse is shown for the nonperformance of the requisites of the law, as to demand and notice, in regard to the notes which fell due in 1863.

We concur, therefore, with the judge of the district court that the holder of the notes which matured in 1862 and 1863, by his negligence and want of diligence, has lost all recourse against the indorser of them.

The two notes payable in 1864 stand upon a different footing. It is true they were not protested until many months after their maturity; but by the President's proclamation of March 31, 1863, commercial intercourse was interdicted until the end of the rebellion, which was virtually suppressed in the month of May, 1865, by the surrender to the United States forces of the last of the Confederate armies.

Two months elapsed between that event and the date of the protest, and, under ordinary circumstances, that unnecessary delay would have been fatal; but it seems that no administrator was appointed to the succession of Robert Many until the very day on which the protest was made. Under the commercial law, which in cases like this is not in conflict with the positive injunctions of our statutes, neither demand nor notice are required until a reasonable time after the appointment of an administrator. See Story on Promissory Notes, § 250, and Parsons on Bills and Notes, p. 360.

No laches is imputed to the administrator, and, as the indorser was duly and legally notified of the protest of the notes due in 1864, he is liable therefor.

For the reasons assigned by the judge of the lower court, and those now given by this court—

It is ordered, adjudged, and decreed that the judgment of the district court be affirmed, at the costs of the appellant.[18]

[18] See, also, Wilson v. Senier, 14 Wis. 411 (1861), delay incident to the holder's sickness; Windham Bank v. Norton, 22 Conn. 213, 56 Am. Dec. 397 (1852); Pier v. Heinrichshoffen, 67 Mo. 163, 29 Am. Rep. 501 (1877), delay in the mails.

PATTERSON v. TODD & LEMON.

(Supreme Court of Pennsylvania, 1852. 18 Pa. 426, 57 Am. Dec. 622.)

This was a suit before a justice of the peace, by Todd & Lemon against George W. Patterson, indorser of a promissory note, as follows:

"Sixty days after date, I promise to pay to G. W. Patterson, or order, the just and full sum of fifty-eight dollars and sixty-two cents, for value received. Witness my hand and seal, 16th day of December, 1841.

58.62 [Signed] John S. Wilt.
1.17, 4 months' interest.

$59.79."

Indorsed:

"George W. Patterson, per Samuel M. Greer.

"For value received, we assign the within note to Wm. K. Piper, and do guaranty the payment of the same.

"June 1, 1842. Todd & Lemon."

The trial court charged in part as follows:

"The claim is upon the alleged indorsement; and the plaintiffs must recover upon that indorsement, if at all. They do not claim, and cannot claim, to recover in their name on any guarantee given by Patterson to Barr.

"Was the note indorsed by Patterson, and indorsed after due? This is a question of fact for you. If it was, it thence went into circulation on the credit of the indorser. Such indorsement is to be considered as the making of a new note, and imposing on the indorser the primary obligation of a drawer; and to charge him demand and notice need not be shown. Jordan v. Hurst, P. L. J. vol. 9, p. 258. If Patterson indorsed the note after it was due, then the plaintiffs are, therefore, entitled to a verdict for its amount, with interest; otherwise they are not. The question of fact is for you."

The defendant excepted. Verdict for the plaintiffs. The defendant brings error.[19]

LEWIS, J. The questions for decision in this case have relation to the effect of indorsing a promissory note overdue. (1) What is the contract which the law implies from such an indorsement? (2) Is the implied contract subject to modification by parol evidence of the special agreement made by the parties at the time of the transaction? In 1816, Chief Justice Parker, in Field v. Nickerson, 13 Mass. 131, considered it remarkable that the law on so familiar a contract as the indorsement of a note on demand should at that late period be doubtful; and it is certainly to be regretted that on a kindred, if not the identical, question it remains in the same condition in Pennsylvania.

[19] The statement of the case is abridged, and the arguments of counsel are omitted.

The law of bills of exchange seems to be well understood. Every business man knows that, when he receives an inland bill of exchange, it is his duty to present it for payment, at maturity, if payable at a particular time; or within a reasonable time, if payable at sight; and, in either case, to give immediate notice to the drawer, if the bill be dishonored. If these duties be neglected by the holder, the drawer is, in general, discharged from all further liability on the bill. It is also well understood, among the learned and unlearned, that the rules of the law merchant which regulate the liabilities of the parties on bills of exchange apply also to the indorsement of promissory notes. The indorser of a note is considered as the drawer of a bill of exchange upon the maker, and the body of the note is referred to for the purpose of showing the sum to be paid, the time and place of payment, and the fact that the bill is already accepted by the maker of the note, whose signature thereto, places him, as between the indorsee and himself, in the condition of a drawee of a bill of exchange, after acceptance. Where a note is indorsed before it is due, the holder must present it for payment at maturity, and in case of default must give immediate notice of the dishonor. But, after the note becomes due, it is payable whenever the holder chooses to demand it, and for this purpose an action at law is a sufficient demand, as between the maker and holder. Like a contract for the payment of money, where no time of payment is specified, it is legally payable presently. So that, when such a note is indorsed, the indorser still stands in the condition of the drawer of an inland bill of exchange; and we refer to the note, as before, for the purpose of ascertaining the amount, and the time and place of payment. The time of payment having passed, the note is, in law, payable on demand, and this shows that the indorsement is to be considered as if made upon a new note payable on demand, and the legal effect of it is precisely the same as if the indorser had drawn an inland bill of exchange upon the maker, payable at sight. It is the duty of the holder of such a bill to present it for payment within a reasonable time, and if the bill be dishonored to give immediate notice thereof to the drawer. In the case of an indorsement of a note overdue, the holder is, in like manner, bound to present it for payment within a reasonable time, and, in case of nonpayment, to give immediate notice of the dishonor to the indorser, otherwise the latter is discharged from liability. This doctrine is fully sustained by the authorities.

It is stated in Chitty on Bills, 15, 16, that a bill may legally be indorsed after it is due and has been dishonored, but not after it has been paid by the acceptor (Mutford v. Walcot, 1 Ld. Raym. 575; Dehers v. Harrid, 1 Show. 163; Callow v. Lawrence, 3 Maule & S. 97; Beck v. Robley, 1 H. Bl. 89 n; Hubbard v. Jackson, 1 Mo. & P. 11), and that a bill, indorsed after due, is equivalent to drawing a new bill payable at sight (Dwight v. Emerson, 2 N. H. 159; Rugley v.

Davidson, 2 Mill's Const. [S. C.] 33). But there is this distinction between notes, etc., indorsed after and before due: That in the first case the holder takes them subject to all the defenses to which they were subject in the hands of the original parties. Chitty on Bills, 15, 16. It may fairly be inferred, from Mr. Chitty's statement of the distinction between indorsements of bills after due and before due, that the only difference is that in the first case the holder takes them subject to all the equities which existed between the original parties, and in the last case he takes them discharged of all such defenses.

That the indorsement of a note overdue is equivalent to drawing a new bill payable at sight, upon which the indorser is liable only upon proof of a demand upon the maker within a reasonable time, and immediate notice of the default, is fully established by the following decisions made by the highest courts of our sister states, and pronounced by judges whose learning and experience in this particular branch of the law entitle their opinions to the highest regard: Poole v. Tolleson, 1 McCord (S. C.) 199, 10 Am. Dec. 663; Ecfert v. Des Coudres & Co., 1 Mill, Const. (S. C.) 70; Course & McFarlane v. Shackleford's Adm'rs, 2 Nott & McC. (S. C.) 283; Bishop v. Dexter, 2 Conn. 419; Field v. Nickerson, 13 Mass. 131; Colt et al. v. Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584; Berry v. Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267; Agan v. McManus, 11 Johns. (N. Y.) 180; Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Id., 1 Sandf. (N. Y.) 199; McKinney v. Crawford, 8 Serg. & R. (Pa.) 353; Brenzer v. Wightman, 7 Watts & S. (Pa.) 265.

The cases which are supposed to conflict with this view of the subject, and to sustain the position that the contract of indorsement, when made upon a note overdue, changes its character, and becomes an original and unconditional engagement to pay the amount, are: Brown v. Davies, 3 T. R. 80; Bank of N. America v. Barriere, 1 Yeates (Pa.) 360; Leidy v. Tammany, 9 Watts (Pa.) 353; and Jordan v. Hurst, 2 Jones (Pa.) 269. In Brown v. Davies, the only question was whether the maker, in an action against him by an indorsee, could be permitted to prove a payment to the payee before the indorsement. No question touching the liability of the indorser arose in the cause, or was decided by the court; and the misapprehension which has since occurred in relation to some of the loose remarks of one of the judges on a question to which his attention was not drawn, and on which he did not feel called upon to speak with precision, shows the danger of relying upon such obiter dicta as authority for anything. The case of Bank v. Barriere, 1 Yeates (Pa.) 360, was decided by a single judge, upon its own special circumstances, and has not only been so explained and understood, but it was solemnly decided by this court, nearly 30 years ago, that it furnished no authority for the doctrine that the conditional contract of indorsement may be tortured into an original unconditional engagement. McKinney v. Crawford, 8 Serg. & R. (Pa.) 351. The case of Leidy v. Tammany, 9

Watts (Pa.) 353, like that in 1 Yeates, 360, was properly decided upon its special circumstances; and the observations of the judge, in going further than the case required, must not be received to unsettle the established rules of law.

There are other cases in which the erroneous idea that an indorsement of a note overdue is a new note seems to float in the minds of the judges; but the error arises from a want of precision in the language used in some of the early cases. When it was intended to say that such an indorsement was a new bill, payable at sight, the judge has been erroneously supposed to mean a new note payable on demand. The difference is so manifest as to need no explanation. In Jordan v. Hurst, 2 Jones (Pa.) 269, a demand was made upon the maker of the note on the fourth day after the indorsement, and it was stated in the case "that the drawer [of the note] had no property or effects out of which the debt could be levied." There was no complaint of a want of diligence in making demand upon the maker of the note, and we do not propose to inquire into the propriety of the decision that his insolvency dispensed with the necessity of notice to the indorser. But it cannot be denied that the observations of the judge who delivered the opinion of this court in that case had a tendency to mislead the intelligent and excellent president who decided this cause in the court below. The observations of Mr. Justice Coulter lose much of their weight, however, when it is remembered that they extended to a question not necessarily arising in the case, that they are founded chiefly upon the cases already explained as not sustaining the position that an indorsement of a note overdue is a new note, and that the learned judge himself virtually abandons the position when he concedes that the action against the indorser can only be sustained "after the original maker of the note has refused payment." This implies the necessity of a demand upon the maker, which is altogether repugnant to the idea that the indorsement is a new note.

The interrogatories of Mr. Justice Duncan, in McKinney v. Crawford, 8 Serg. & R. (Pa.) 353, have never been satisfactorily answered by those who desire to convert an indorsement into an absolute and unconditional engagement to pay the amount. "If it was a contract of absolute and immediate liability, why indorse? For what purpose draw? Why not give his own note?" 8 Serg. & R. 353. We fully adopt the language of Mr. Justice Duncan, in the case last cited, in which he declares that "it is now a doctrine well settled that in the case of all notes, whether overdue or not, to render the indorser liable, there must be a demand on the maker and notice to the indorser, unless a contract of a different nature from that of indorsement is to be implied from the special circumstances, and the understanding of the parties at the time of the transaction." McKinney v. Crawford, 8 Serg. & R. (Pa.) 357. A note overdue and a note payable on demand are, in legal effect, identical, and therefore the decision in McKinney v. Crawford is a direct decision on the question involved in this case.

We have seen that the contract of indorsement may be converted by parol evidence into an absolute and unconditional engagement to pay the amount. 1 Yeates, 360; 9 Watts, 353. It follows that it may be explained, by the same kind of evidence, to mean nothing further than a transfer of the debt, without recourse to the indorser. The evidence on this part of the case ought to be submitted to the jury, if the plaintiff, on another trial, by the proof of demand and notice, should establish a prima facie title to recover. But in the absence of evidence of a demand upon the maker of the note and notice to the indorser, the instructions given by the court below were erroneous. The instruction ought to have been given that the plaintiffs were not entitled to recover.

Judgment reversed.

MORRISON v. McCARTNEY.

(Supreme Court of Missouri, 1860. 30 Mo. 183.)

NAPTON, J.[20] This was a suit by Morrison & Lackland upon a check payable in currency, drawn by the defendant upon E. W. Clark & Bros., bankers in St. Louis, in favor of Bohn & Co., and indorsed to plaintiffs. The check was dated and delivered to Bohn & Co. on the 2d of October, 1857, and transferred by indorsement to the plaintiffs on the same day. It was not presented to the drawees until the 29th of January, 1858, when payment was refused, and it was duly protested and notice given to the defendant. It appears that, about 3 o'clock of the 3d of October, the house of Clark & Bros. was closed or stopped payment; but on the 6th of October, 1857, the defendant, who had previously commenced suits by attachment, compromised these suits, settled with Clark & Bros., and withdrew his deposits. The question in the case was whether the plaintiffs were entitled to recover, notwithstanding their failure to present the check on the day after it was indorsed to them, upon showing that the drawer sustained no injury by the delay, and that before suit brought, and within a reasonable time, demand, protest, and notice were duly given.

The law on this subject is stated in Kent's Commentaries as follows: "The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. The check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain till called for; and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the

[20] The statement of the case, the arguments of counsel, and part of the opinion are omitted.

drawee's failure, and he may, under circumstances, be deemed to have made the check his own to the discharge of the drawer. But this is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser, who has a right to require diligence on the part of the holder to relieve him from responsibility." 4 Kent, 549.

This view of the law is adopted by Judge Story in the chapter, in his work on Promissory Notes, devoted to the subject of checks.

His language is that "the drawer [of a check] will at all times be liable to pay the same if the holder can show that the drawer has sustained and can sustain no loss or damage from the omission to demand payment, at an earlier date, of the bank or banker on whom the check is drawn." "In case of a check," says Judge Story, "the drawer is treated as in some sort the principal debtor, and he is not discharged by any laches of the holder in not making due presentment thereof, or in not giving him notice of the dishonor, unless he has suffered some loss or injury thereby, and then only pro tanto." Story on Prom. Notes, 492.

The same doctrine is maintained in the most recent decisions of the highest courts of New York. Little v. Phenix Bank, 2 Hill, 425. The opinion of Judge Cowen, in Harker v. Anderson, 21 Wend. 372, has not been sustained. In a word, this opinion appears to prevail generally both in England and in the United States, where the question has arisen. Alexander v. Burchfield, 3 Scott, N. R. 558; Robinson v. Hawkeford, 9 Q. B. 52; Byles on Bills, 14, and note 2.

The justice and policy of the rule are sufficiently obvious, and are forcibly alluded to and illustrated by Judge Story, in his opinion in the Matter of Brown, 2 Story, 516: "If the drawee, upon the presentment, refuses to pay the check because he has no funds, then the drawer is not injured; and if he has funds, and refuses to pay, then, if the bank is still in good credit, as the drawer has sustained and can sustain no loss, there is every reason to hold him liable therefor. Every check is prima facie presumed to be given for value received by the drawer; and if, by reason of the want of due presentment or want of due notice of the dishonor, he is to be totally exonerated, he pockets both the original consideration and his funds in the hands of the bank or banker. In such a case, can it be said, with truth or justice, that he is to be enriched at the expense of the holder of the check? or that he shall not be deemed to hold the money as money had and received for the use of the holder, either because he had no funds in the bank or because he still retains those funds appropriated to the use of another for his own use?"

The argument seems to be conclusive. Whether it is not just as applicable to bills of exchange is another question not necessary to be considered. See Edwards on Bills, p. 396.

In the case of St. John v. Homans, 8 Mo. 382, decided by this court in 1844, the judgment turned upon the fact of a loss to the drawer of

the check. An opinion was expressed that the weight of authority recognized no distinction between the degrees of diligence required in checks and bills of exchange in determining the responsibility of the drawer. However that may have been at that time, the current of authority now is, as we have seen, decidedly the other way. * * *

Judgment affirmed.[21]

NATIONAL NEWARK BANKING CO. v. SECOND NAT. BANK OF ERIE.

(Supreme Court of Pennsylvania, 1870. 63 Pa. 404.)

This was an amicable action of assumpsit, commenced May 15, 1866, between the National Newark Banking Company, plaintiffs, and the Second National Bank of Erie, defendants.

The suit was on the following draft:

"Second National Bank of Erie,

"Erie, Pa., March 17, 1866.

"Pay to the order of A. Judson, Esq., three hundred dollars.

"Wm. C. Curry, Cashier.

"To Culver, Penn & Co., New York.

"$300."

The draft was afterwards indorsed by Judson, who sold it to the plaintiffs on the 27th of March. It was presented for payment on the 28th of March, payment was refused, and the draft was duly protested. The facts of the case are stated fully and in detail by Mr. Justice Read in delivering the opinion of the Supreme Court.

The court below (Derrickson, J.), after referring to the facts, charged:

"I am not aware at this moment of any decision which defines the time within which a bill must be presented, but all the authorities say it must be within a reasonable one. What this will be in any one given case would very seldom, if ever, answer for another, because the circumstances attendant on each are so varied and different, and in most cases it would be a question of fact for the jury to pass upon, and it would be so now, were there any disputed facts arising out of the testimony, which there are not. Admitting, then, what the witness testifies to be true, we think it affords no excuse for the delay, which we also think was unreasonable. That the Newark Bank itself is free from the charge we readily admit, but not from that of its indorser, for the time which had elapsed was patent on the face of the bill. What is thus said will answer the several points made by the counsel of the plaintiffs."

The verdict was for the defendants.

[21] Accord: Matlock v. Scheuerman, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747 (1908).

The plaintiffs took a writ of error, assigning the charge for error.[22]

READ, J. The court, assuming that there were no disputed facts in this case, undertook to decide the question whether the presentment of the bill or draft which was the subject of this suit was made to the drawees in New York within a reasonable time. Their decision was that the time taken was unreasonable, and that the defendants were not liable to pay the amount of their draft.

A. Judson, who was acting as the agent of T. H. Hubbard in the collection of money claimed by him, by way of damages, from different persons for the unlawful use or infringement of a photographic patent, on Saturday, 17th March, 1866, purchased the following draft from the defendants: * * *[23]

Mr. Judson was a resident of Newark, New Jersey, and his business took him through the oil region. He stayed at Erie over Sunday, and on Monday, the 19th of March, left Erie and traveled as far as Oil City that day, stopping at Meadville and Franklin on his way; he stopped at Oil City on Monday night, and on Tuesday morning, the 20th, left for Pithole, and, reaching that place Tuesday evening, stayed there Tuesday night; on Wednesday he went to Titusville, where he stayed Wednesday; on Thursday he went to Corry and stayed there Thursday night; on Friday the 23d of March he left Corry and traveled continually night and day, until he arrived at Newark, his place of residence, on Sunday, March 25th. Until he reached Corry he traveled partly by cars and partly by stage, making collections on his route at different places where he stopped. On Monday, the 26th of March, he remained at home very much fatigued and overcome by the journey. On Tuesday, the 27th of March, he transferred the bill to the plaintiffs, receiving from them in money the full face of the bill. It was sent by them, by mail to their correspondent, the Merchants' National Bank of New York, and was on the 28th of March presented by them for payment to the drawees, and payment refused; they having failed the day before.

There is no allegation that the plaintiffs, so far as regards themselves, did not present the draft in due time, but it is alleged that the delay on the part of Judson was unreasonable, and so the court held.

The bill was drawn at Erie, in the state of Pennsylvania, at the extreme western end of it, upon persons in the city of New York, and sold to a traveling agent whose residence was in Newark, in the state of New Jersey. As all bank notes in the present day are at par everywhere, the object in purchasing a draft was to prevent loss by theft, robbery, or accident. The business of the agent led him through the different places we have stated, and detained him necessarily on the road, and he was therefore not obliged, nor could it be expected, while so doing, that he would transmit this draft for collection to New

[22] The arguments of counsel are omitted.

[23] A copy of the draft given above is here printed in the original report of the case.

York, nor would there be in fact any opportunity to negotiate it until he reached his own home in New Jersey.

We are therefore of opinion that under these circumstances the bill was presented within a reasonable time, and that the defendants are liable to pay the same.

Judgment reversed.[24]

[24] It is urged we should hold as a matter of law there was unreasonable delay to make such presentment before the failure of Gilman, Son & Co. was made public on October 16, 1902. According to the general tenor of the testimony a draft purchased and forwarded from West Branch to Ortonville, Minn., on October 7th, and forwarded thence without intermediate negotiation to New York, would ordinarily be presented to the drawee somewhere from October 12th to October 14th. Taking the average of these dates, a delay of about three days had occurred when the correspondent closed its doors. Now, while it is true that the court may sometimes determine the reasonableness or unreasonableness of delay in presentment of a negotiable instrument as a matter of law, the question is ordinarily one of fact. As between the drawer and payee in this case, the question whether the delay was reasonable depends upon circumstances disclosed in evidence. If the bank knew that appellee desired to send the draft to Ortonville, to be there held for a few days for the completion of the land purchase, and issued the paper to him for that purpose, then appellant can claim no advantage from the fact that it was not forwarded to New York for payment on the same or following day, provided, of course, that such delay was reasonably necessary for the accomplishment of the known purpose for which it was obtained. Obviously this is a question for the jury to consider and pass upon, in view of all the proved facts and the ordinary course and methods of business. Bank drafts or bills of exchange differ from ordinary bank checks, in that the latter usually contemplate practically immediate presentation for payment. This is especially true when the check is drawn upon a bank in the town or city where both drawer and payee reside. On the other hand, a bank draft, bill, or check upon a distant bank, used as a means of transmission of funds between different sections of the country, is more usually than otherwise negotiated, and passes through various hands, and serves the purpose of perhaps many persons before final presentment. For instance, a resident of Iowa may send a New York draft to a creditor in San Francisco, and the latter may indorse it to his own creditor in Chicago, and the latter in turn indorse it to his creditor in New York, who indorses it to his local bank, which presents it to the drawee for payment. Sent directly from the place of its issuance, such draft would have been presented within from two to four days of its date; but by the circuitous route we have described its transmission requires ten days or more. Yet no one, we think, would contend for the proposition that a delay in presentment thus occasioned would work a discharge of the drawer. Of course, if any person to whom the bill is indorsed fails to promptly negotiate and pass it along on its course to final presentation, and loss follows, he alone must bear it, unless the delay has been occasioned with the express or implied consent of the drawer. If a person, being about to set out upon an extended visit to a distant state, and wishing to carry his funds in bank drafts to be negotiated from time to time as he may need the money, applies to his banker, who issues the desired paper, knowing the purpose for and the manner in which it is to be used, we think it unquestionable that the risk of loss by the insolvency of the drawee is not shifted from the drawer to the payee simply because the latter does not put the bills in immediate course of collection." West Branch Bank v. Haines, 135 Iowa, 313, 112 N. W. 552, 554 (1907).

GIFFORD v. HARDELL.

(Supreme Court of Wisconsin, 1894. 88 Wis. 538, 60 N. W. 1064. 43 Am. St Rep. 925.)

This action was brought to recover against the defendant, as indorser, the amount of four checks drawn on the Commercial Bank of Milwaukee by one Musselman, in favor of divers persons, and which had been indorsed to the defendant, who on the 17th of July, 1893, sold and indorsed them to the plaintiff. They were indorsed and delivered to the plaintiff's father, at Dousman, Waukesha county, Wis., who at once mailed them to the plaintiff, at New Richmond, Wis. The checks were not presented for payment until the 21st of July, when the Commercial Bank had failed, and were protested for nonpayment.

The only question was whether the plaintiff, or his agent, the Manufacturers' Bank of New Richmond, Wis., which undertook the collection of the checks, used due diligence in presenting them for payment. They were forwarded to the plaintiff, at New Richmond, by his father, on the day they were indorsed, and received by him, by due course of mail, July 18th, at 5 o'clock p. m., and were at once delivered to said Manufacturers' Bank for collection. It immediately inclosed and mailed the checks to its bank correspondent in Chicago for collection, according to its usual custom, having no regular bank correspondent in Milwaukee. They were received and forwarded by the National Bank of Illinois, of Chicago, to Milwaukee, Wis., but were not presented for payment until the 21st of July. The Commercial Bank of Milwaukee, upon which they were drawn, failed, closing its doors at the usual hour on the 20th of July. There was a direct mail route from New Richmond to Milwaukee, and thence to Chicago, the latter city being about 85 miles south of Milwaukee. The evening mail of the 18th of July at this time left New Richmond at 8:41 p. m., and would have reached Milwaukee at 11 o'clock in the forenoon of the 19th, and Chicago at about 1 o'clock of the same day; and the checks arriving at Milwaukee, as above stated, could have been presented for payment at 10 o'clock in the morning of the 20th, while the bank on which they were drawn was honoring its checks. The court held that sending them by way of Chicago for collection was not the use of reasonable diligence in presenting them for payment, and directed a verdict for the defendant, and from a judgment thereon in favor of the defendant the plaintiff appealed.

PINNEY, J. (after stating the facts as above). The same rules which exist in relation to the necessity of presentment and notice, in order to charge the indorser of bills of exchange in general, apply as well to an indorser of a check. A check on a bank is presumed to be drawn against deposited funds, and, unlike a bill of exchange, which need not be drawn on a deposit, is generally designed for immediate pay-

ment, and not for circulation. For this reason it is of greater importance than in the case of a bill that a check shall be promptly presented, and the drawer notified of nonpayment, so that he may speedily inquire into the cause of refusal, and take prompt measures to secure his funds deposited in the bank. The indorsers of bills and of checks stand on the same footing in reference to the effect of delay or failure in making presentment, or giving notice of nonpayment, and are absolutely and entirely discharged if presentment be not made within a reasonable time; and this rule applies as between an indorser and indorsee, as in the present case.

It is plain from the facts that, if the bank at New Richmond had forwarded the checks direct to Milwaukee for collection, they would have been received, at the furthest, in time for presentation and payment on the 20th of July, and while the bank on which they were drawn was transacting its usual business; and it appears that it had ample funds of the drawer, with which to have paid them. The period of reasonable time for presentation, as between the plaintiff and the defendant, as indorser, undoubtedly began when the checks were delivered to the plaintiff's father for him, at Dousman, Waukesha county, Wis., on the 17th of July. Daniel, Neg. Inst. §§ 1586, 1587, and cases in notes. The drawer of a check cannot rightfully withdraw his funds necessary for the payment of it upon proper presentation, and it would be unjust to hold that, however long the holder might permit the fund to remain, it should be at the drawer's risk. Hence, the check must be presented within a reasonable time, or the indorser will be discharged, and the fund is at the risk of the holder, if he permits the deposit to remain. No transfer, or series of transfers, can prolong the risk of the drawer or indorser beyond this period, though each party is allowed the same period, as between himself and his immediate predecessor, that the payee had, as between himself and the drawer; for no transferee can stand on any better footing than his transferrer, in respect to the time within which the check must be presented in order to render the drawer's or previous indorser's liability absolute in the event of the failure of the bank. Daniel, Neg. Inst. § 1595, and cases in note.

The rule of diligence, as between indorsee and indorser, is the same as between payee and drawer. This requires, in general, that, where the payee receives the check from the drawer in a place distant from the place where the bank on which it is drawn is located, it will be sufficient for him to forward it by post to some person at the latter place on the next secular day after it is received, and then it will be sufficient for the person to whom it is thus forwarded to present it for payment on the day after it has reached him by due course of mail. When the defendant delivered the checks, properly indorsed, at Dousman, Wis., on the 17th of July, he had a right to assume and expect that the plaintiff, or his father, would present them for payment within a reasonable

time, and they took the risk of making such presentment. Instead, they were sent several hundred miles to the northwest of Milwaukee, to New Richmond, and then back, through Milwaukee, to Chicago, and were then returned to Milwaukee for payment on the 21st, as before stated. It is clear that they were not presented for payment within a reasonable time after indorsement and delivery by the defendant, and the judgment of the county court was therefore correct. First Nat. Bank v. Miller, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499, and cases cited.

The judgment of the county court is affirmed.[25]

GRANGE v. REIGH et al.

(Supreme Court of Wisconsin, 1896. 93 Wis. 552, 67 N. W. 1130.)

On the 20th day of July, 1893, defendants were indebted to plaintiff in the sum of $1,211. After banking hours on that day, in the city of Milwaukee, where plaintiff resided, defendants gave him a check for the amount of such indebtedness on the South Side Savings Bank, located in said city. Such check was not presented for payment either on that or the succeeding day, July 21st. The bank was open for business all of such succeeding day, and would have paid the check had it been presented during that time. The bank did not open for business after the 21st, by reason of which the check was not paid. This action is to recover the amount of the check from the drawers. The circuit court decided that, because of the failure to present the check for payment to the bank within a reasonable time, recourse upon the drawers was lost; and accordingly judgment was rendered for the defendants, and plaintiff appealed.

MARSHALL, J. (after stating the facts as above). The settled law applicable to the facts of this case is that, if a person receives a check on a bank, he must present it for payment within a reasonable time, in order to preserve his right of recourse on the drawer in case of nonpayment by the drawee; and that, when such person resides and receives the check at the same place where such bank is located, a reasonable time for such presentation reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays. Tiedeman Com. Paper, § 413; 2 Daniel, Neg. Inst. § 1590, 1591, and cases cited; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859. Plaintiff failed to comply with the law in this respect; hence defendants were discharged from all liability to answer for the default of the bank. Such was the decision of the trial court, and it must be affirmed.

[25] Accord: Aebi v. Bank, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925 (1905). Compare Citizens' Bank v. Bank, 135 Iowa, 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303 (1907).

GORDON v. LEVINE.

(Supreme Judicial Court of Massachusetts, Suffolk, 1907. 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565.)

MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated December 30, 1905, which was Saturday, though there was some question whether it was actually drawn and delivered on that day, or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it, but that he presented it Monday morning, January 1st, and was told there were no funds; and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him, receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein who deposited it on January 4th, in the Faneuil Hall National Bank, in Boston, for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5th, to the bank on which it was drawn, the Provident Securities & Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant the bank had failed, and that the defendant promised to make the check good. The defendant denied this, and also the plaintiff's statement that he had asked the plaintiff not to present the check for a couple of days, and introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have down to the failure of the bank. It was admitted that the bank failed on Friday, January 5th, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the judge to give certain instructions that were requested, and to the admission of certain testimony.

The defendant, in substance, asked the judge to instruct the jury that a check must be presented for payment in a reasonable time and that in order to have been presented within a reasonable time the check in suit should have been presented before the close of banking hours on Monday; that its transfer to successive holders would not extend the time for presentment, and a presentment on January 5th would not be within a reasonable time and if the bank failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that

extent. The judge gave in part the instruction thus requested, and refused it in part. He instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday that would be within a reasonable time. But he refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. On the contrary he instructed them that "the court had occasion to consider that in one case in this commonwealth (referring, we assume to Taylor v. Wilson, 11 Metc. 44, 45 Am. Dec. 180); and it is there stated that a check may also be passed from hand to hand and a reasonable time is allowed to each party receiving the same to present it for payment." And after calling their attention to the provisions of the statute (Rev. Laws, c. 73, § 209) that in considering what a reasonable time is "regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case," left it to them to determine whether the check was presented on Monday, or, if they were not satisfied that it was, then to determine whether if it passed, from hand to hand and each one had a reasonable time to present it the presentment on Friday was within a reasonable time. For aught that appears the jury may not have been satisfied that the check was presented on Monday and may have found for the plaintiff on the ground that the presentment on Friday was within a reasonable time. The question is therefore distinctly raised whether a presentment on Friday could have been found to be within a reasonable time.

The general rule is as was stated by the judge and as is provided in the negotiable instruments act (Rev. Laws, c. 73, § 203) that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented and the drawer sustains a loss by reason of the failure of the drawee he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument which though defined in the negotiable instruments act (Rev. Laws, c. 73, § 202) as "a bill of exchange drawn on a bank payable on demand" is intended for immediate use (Mussey v. Eagle Bank, 9 Metc. 306, 314) and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss if any resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The negotiable instruments act provides generally (Rev. Laws, c. 73, § 209) as the judge said that "in determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this

check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is that where the drawer and drawee and the payee are all in the same city or town a check to be presented within a reasonable time should be presented at some time before the close of banking hours on the day after it is issued and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss it falls not on him but on the holder. * * *

The case of Taylor v. Wilson, 11 Metc. 44, 45 Am. Dec. 180, relied on by the plaintiff, was a case where a check was drawn by one doing business in Charlestown and living in Roxbury on a bank in Charlestown in favor of a resident of Newport. The check was dated September 30, 1842, which was Friday, and was received by the payee Saturday evening, October 1st. On Tuesday, October 4th, having been previously cashed for the payee by a local bank, it was given by the cashier of that bank to a messenger to be carried to the Merchants' Bank at Providence in the usual course of remitting its funds and securities and was received by that bank on Wednesday and sent by its cashier to the Suffolk Bank at Boston. That bank received it on the next day (October 6th) and presented it on the same day to the bank on which it was drawn and payment was refused; the bank having closed its doors on Monday morning, October 3d, and being insolvent. The case was submitted to the court on agreed facts with power to draw inferences and the court found in favor of the payee and against the drawer. The court held in effect that under the circumstances there had been no laches and that the check had been presented within a reasonable time. There is a sentence in the opinion to the effect that a check may pass from hand to hand and that a reasonable time is allowed to each party receiving it to present it for payment and the case has been cited to that point with approval in Veazie Bank v. Winn, 40 Me. 60. But we do not think that the court meant to lay down the rule that under any and all circumstances each party receiving a check from a previous holder was entitled to a reasonable time to present it for payment, or that the case required that it should lay down such a rule. On the contrary the court expressly said that a party receiving a check was not guilty of laches if he did not present it on the same day on which it was drawn, but was allowed a reasonable time for that purpose, and that the next day was held to be such reasonable time. The decision should be limited to the case before the court which was that of a check drawn on a bank in one place and sent to a payee in another place at considerable distance and forwarded for presentment in the usual course of business, and, so understood and applied, was correct. It follows from what has been said that the exceptions must be sustained. The conclusion to which we have come on

the principal question renders it unnecessary to consider the questions of evidence, though we may observe that we see no error in regard to them.

Exceptions sustained.[26]

COLUMBIAN BANKING COMPANY v. BOWEN.

(Supreme Court of Wisconsin, 1908. 134 Wis. 218, 114 N. W. 451.)

Appeal from Barron county circuit court.

June 10, 1903, the banking firm known as the Farmers' & Merchants' Bank, of Bangor, Wis., sold to the defendant a $400 draft, drawn in the usual form, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America, at Chicago, Ill. The draft was sent to the defendant at Barron, Wis., and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail, at Spokane, Wash., June 16, 1903, and was there received by him June 20th thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, Cal. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving $400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Ill., by which it was received July 18th thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for nonpayment by a duly authorized notary public, who forwarded a manifest thereof with notices of protest for A. R. Tabbert, the plaintiff and the defendant, to the plaintiff at San Francisco, Cal., and also sent due notice to the National Bank of North America at Chicago, Ill., and to the drawer at Bangor, Wis., July 19, 1903. Plaintiff upon receipt of the manifest and notices duly sent the one for defendant to him at Barron, Wis., by whom it was duly received, and sent the one for Tabbert by mail to his post office address and reputed place of residence, that being San Francisco, Cal. Thereafter due demand was made on defendant for payment of the draft, and the same was refused. July 28, 1903, the property of the drawer was placed in the possession of a receiver, who duly paid upon the draft $144.49, January 6, 1904, $61.93, May 20th thereafter, and $30.96, June 5th following. Plaintiff was the owner of the draft at the time of the commencement of the action, and at the time of the trial thereof there was due thereon $210.

The pleadings presented issues for decision involving facts as above detailed. The case was tried by the court resulting in findings of fact in accordance with the statement, and a conclusion of law that plaintiff became the owner of the draft in due course, and was entitled to judgment for $210, with costs. Judgment was accordingly rendered.

[26] Same case, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243 (1908).

MARSHALL, J. (after stating the facts as above). Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute (Sanborn's St. Supp. 1906, §§ 1675 to 1684—6; chapter 356, p. 681, Laws 1899) to support the proposition, that appellant was released from liability on the instrument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading.

The negotiable instrument law is not merely a legislative codification of judicial rules previously existing in this state making that written law, which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law merchant generally as recognized here, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212.

The primary question discussed by appellant's counsel, it is believed is fully covered by the negotiable instrument law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business transactions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent, and some real, conflicts, to remedy which was one of the principal objects of the law.

To that end it was provided in section 1680, "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer," and it was further provided in section 1684—1, "A check is a bill of exchange drawn on a bank, payable on demand."

As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The only exception referred to material to this case is contained in section 1684—2, in these

words: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment, is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 1678—1, which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed. Section 195, Selover, Neg. Inst. Law.

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. Gowan v. Jackson, 20 Johns. (N. Y.) 176. Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

The court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and properly held that such circum-

stance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

The point is made that the instrument was not presented to the drawee for payment during banking hours. The negotiable instrument law at section 1678—2 provides that "Presentment for payment to be sufficient, must be made: * * * at a reasonable hour on a business day. * * *" The evidence shows that the paper, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of 3 and 6 o'clock. The proof is to the effect that such was the customary way of doing such business in Chicago, where the drawee was located. That is, as we understand it, that the business day of the bank continued after the closing of the clearing house transactions so as to enable banks holding paper for collection, refused recognition in such transactions, to present the same for payment as was done in this case. That satisfies the statute. What constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question. In case of a transaction occurring in a foreign jurisdiction, as in the instance in question, the court cannot take judicial notice of what constitutes reasonable hours on a business day. 1 Daniel on Neg. Inst. (5th Ed.) § 601. It is a matter of proof, though in case of the notarial certificate of the transaction, as here, being regular so as to furnish prima facie proof that the paper was duly presented for payment, that raises the presumption that the presentment was made at a proper time. Cayuga County Bank v. Hunt, 2 Hill (N. Y.) 635.

Judgment affirmed.[27]

COMMERCIAL NAT. BANK OF SYRACUSE v. ZIMMERMAN et al.

(Court of Appeals of New York, 1906. 185 N. Y. 210, 77 N. E. 1020.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 5, 1905, affirming a judgment in favor of defendant Zimmerman, entered upon a decision of the court on trial at Special Term.

The plaintiff brought this action to foreclose a lien on certain bonds of a railroad company, which it had held as collateral security for the payment of a note of the defendant, the Syracuse Construction Company, indorsed by Joseph Zimmerman, and to recover a judgment for any deficiency, arising upon the sale of the bonds, against Zimmer-

[27] Accord: Plover Bank v. Moodie, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476 (1906) semble. See Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243 (1908).

man's estate. The note reads as follows: "$10,000. Syracuse, N. Y., Sept. 16, 1899. On demand after date we promise to pay to the order of Joseph Zimmerman ten thousand dollars at Commercial Bank. Value received with interest. Syracuse Construction Co., per J. S. Kaufmann, Treas."

Upon the trial of the issue, which was had without a jury, the trial judge found, as the facts of the case, that the note was indorsed by Zimmerman, without consideration and for the accommodation of the maker; that on September 20, 1899, the plaintiff discounted the note for the maker, the defendant construction company, receiving the bonds of the railroad company as collateral security for its payment; that, in January, 1903, Zimmerman died intestate, and his widow, this defendant, was appointed his administratrix; that on April 9, 1903, the note was presented to the maker for payment and, payment being refused, was duly protested for nonpayment; that "said note was not presented within a reasonable time after it was issued and that said plaintiff did not demand the payment thereof, or give notice of the dishonor thereof, within a reasonable time." Upon these facts, he reached the legal conclusion that the plaintiff was entitled to enforce a lien upon the bonds by the sale thereof; but that, as the "presentment of said note was not made within a reasonable time after the discount," the indorser, Zimmerman, and his estate were released from all liability thereon. Upon the plaintiff's appeal from so much of the judgment thereupon entered, as adjudged that it was not entitled to judgment against the estate of the indorser for the deficiency upon a sale of the bonds, the Appellate Division, in the fourth department, by a unanimous vote, affirmed the judgment as rendered. The plaintiff now appeals to this court.

GRAY, J. (after stating the facts as above). The only question of importance, which this appeal presents, is of the correctness of the decision that the presentment of the note for payment had not been made by the plaintiff within a reasonable time. That must, necessarily, turn upon the effect of the enactment of the provisions of the negotiable instruments law of 1897. Laws 1897, p. 719, c. 612. Section 131, p. 736, of that law provides that, where the instrument "is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof." By section 4, it provided that "in determining what is a 'reasonable time,' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

Prior to this legislative enactment, the decision of this court in Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 243, was regarded as having settled the rule of law applicable to the determination of such cases. In that case, the note was payable on demand, with interest, and the

question arose as to the continuance of the indorser's liability, where three years had intervened between the making and presentment for payment. Chief Judge Comstock, with the concurrence of the majority of the judges, undertook to resolve what he regarded as the existing uncertainty, as to the rule, which conflicting decisions had brought about, by referring the interpretation of the contract to the adoption of one of two principles. By the one principle, a promissory note, payable on demand with interest and indorsed, is to be regarded as a continuing security and no dishonor attaches until payment is required and refused. By the other, or opposing, rule the holder, if he wishes to charge the indorser, must make his demand of the maker without delay. Judge Comstock finds no intermediate ground to stand upon and holds "that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives, we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight draft. * * * But * * * we think that a note payable on demand with interest is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and refusal to pay. * * * If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the meantime a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is that it is indefinite or indeterminative, and ascertainable only by an actual call for the money; and if that be the meaning of the principal parties the indorser must be deemed to lend his name to the contract with the same intention. * * * We see no good reason why a note, like the one now in question, should not be construed precisely according to its terms, and if we follow that construction such instruments are not dishonored by the mere effluxion of time."

Although the decision in Merritt v. Todd was subsequently discussed, and in some cases criticised, its authority was not shaken as establishing a rule of law and it was expressly followed as late as in Parker v. Stroud, 98 N. Y. 379, 50 Am. Rep. 685. See Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Crim v. Starkweather, 88 N. Y. 339, 42 Am. Rep. 250. Judge Comstock followed the doctrine of the English courts, in differentiating notes payable on demand with interest, from those payable on demand merely. He sought to give effect, in the former case,

to what seemed to be an intention of the parties that, notwithstanding the terms, there should be no immediate demand, and that the time of payment should be future; thus making the instrument a continuing obligation.

The law being thus settled in this state, the negotiable instruments law was passed, in 1897, as the outcome of a general movement to bring about a uniform law in this country covering the subject of bills and notes. It was a codification of the law and in the respect which we are considering it modified the rule as formulated in Merritt v. Todd. It established one rule, which was to be applicable to all cases, that where an instrument "is payable on demand presentment must be made within a reasonable time after issue." No distinction was to be made, as theretofore, when the instrument was an interest-bearing obligation. While therefore it must be regarded as changing the rule upon the subject of the time for the presentment of such instruments, by placing them upon the same footing, the fourth section of the law has to be given effect; which requires, in determining what is a reasonable time, a consideration to be had of the nature of the instrument, any usage of trade and the facts of the particular case. That would certainly be sufficient to authorize the differentiation of bills, or promissory notes, from other instruments for the payment of money; but even where it is a question of the time within which a demand note must have been presented, the facts and circumstances of the case must be regarded. If a note is payable on demand, it is always mature and may at any time be demanded. The statute of limitations commences to run against the maker from its issue. Herrick v. Woolverton, 41 N. Y. 587, 1 Am. Rep. 461. After its issue, what constitutes reasonableness of time for its presentment cannot be determined by any fixed rules; for, plainly, the particular circumstances may be such as to evidence some intention of the parties as to its continuance. And certainly they may be sufficient to justify an inference of unreasonable delay.

In my opinion, what the Legislature intended to accomplish by the provisions of the negotiable instruments law in question was to do away with the distinction between notes, or bills, payable on demand, which Merritt v. Todd had created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, as one for the determination of the court upon the facts. That question, if the facts were unsettled and the testimony was conflicting, might be a mixed one of law and fact, which the jury should decide, under the instructions of the court as to the law; but where they are ascertained, and are not in dispute, the question is one of law. Aymar v. Beers, 7 Cow. 705, 709, 17 Am. Dec. 538; Mohawk Bank v. Broderick, 10 Wend. 304, 308; Carroll v. Upton, 3 N. Y. 272; Hunt v. Maybee, 7 N. Y. 266, 272.

In the present case the defendant offered no evidence, and there was no dispute about the facts. The trial judge had before him the facts

of the discount of a demand note, bearing interest; that the indorsement by Zimmerman was without consideration and for the maker's accommodation; that its payment was secured by the deposit of certain securities; that notwithstanding that some two years after the making of the note the plaintiff had complained to Zimmerman of its nonpayment and twice, a year later, had written that the maker was in default as to the interest, no steps were taken to charge the indorser, by presentment of the note for payment and by protest for nonpayment, until more than three and a half years had elapsed. If the finding that the note was not presented within a reasonable time depended for its justification upon the evidence, we should be, undoubtedly, concluded from reviewing it by the rule of unanimous affirmance. But viewing it, as I think we must, as a question of law to be decided by the court upon the ascertained facts, it depended upon the interpretation of the statute as applied to the facts and, in my opinion, the decision of the trial court was correct.

It is argued by the appellant that the defense that the note was not presented within a reasonable time after its issue was one which should have been specially pleaded in the answer. This objection was not taken upon the trial; but, assuming that it could properly be raised upon the appeal, it is untenable. The burden is on the holder of a note, when seeking to charge an indorser, to prove due and timely presentment, and the giving of notice to the indorser of its dishonor. The obligation of the indorser is conditional upon all the steps having been taken by the holder, which the statute has prescribed as to presentment, and as to notice of nonpayment, etc. The negotiable instruments law is the codification of the law merchant upon the subjects treated, and in setting forth what is required of the holder of a note it casts upon him the burden to prove that the requirements were all complied with. They were necessary conditions of his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute, and the liability of the indorser to make good the contract of the maker, unlike that of a guarantor, is conditional and depends upon the holder's having made a case under the statute of an obligation, which he has caused to mature and, by appropriate legal steps, to become an indebtedness of the contracting parties. Brown v. Curtis, 2 N. Y. 225. Therefore I think it would be incorrect to hold of this defense that it is of an affirmative nature and, like the defense of usury, or any other defense which avoids an obligation, that it must be pleaded to be available.

No other question demands consideration and, for the reasons given, I advise the affirmance of the judgment, with costs. * * *

Judgment affirmed.[28]

[28] Accord: Schlesinger v. Schultz, 110 N. Y. App. Div. 356, 96 N. Y. Supp. 383 (1905), ten months a reasonable time. See, also, Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987 (1902), three months an unreasonable delay.

II. Hour

LUNT et al. v. ADAMS et al.

(Supreme Judicial Court of Maine, 1840. 17 Me. 230.)

Assumpsit on a promissory note, made by the defendants to the plaintiffs, dated December 2, 1836, for $864.84, payable in six months with interest. The writ was dated June 2, 1837. After the note had been read, Jones, the deputy sheriff who served the writ, was offered as a witness by the plaintiffs, and was objected to by the defendants on account of his liability by reason of his having served the writ; it appearing, as the defendants insisted, upon the face of the writ that the note was not then payable. The objection was overruled. The witness then testified, that the writ was handed to him by Caldwell, one of the plaintiffs, between 6 and 7 o'clock on the morning of June 2, 1837, a mile or two distant from the store of the defendants; that on arriving near the store, Caldwell directed Jones to go to the store and wait there, and make no service until he should come, which would be done shortly; that Jones went to the store, and that Caldwell came there soon after, and told one of the defendants he wanted an adjustment of his demand; that the reply was that he would see the other promisors; that in a few minutes they came in; that the conversation after Caldwell came in had lasted half an hour, when Caldwell told Jones, the witness, that it was of no use to try further, and directed an attachment to be made upon the writ; and that the writ was immediately served by an attachment of the goods of the defendants. Here the plaintiffs rested their case, and the judge directed a nonsuit. To that direction the plaintiffs excepted.[29]

SHEPLEY, J. The most favorable position of the case for the plaintiffs is that a demand was made about 8 o'clock on the morning of the day upon which the note became payable, and payment not being then made a suit was immediately commenced. It was decided in the case of Greeley v. Thurston, 4 Greenl. 479, 16 Am. Dec. 285, that a suit might be lawfully commenced on the day the bill or note became payable after a demand had been made at a reasonable hour of the same day.

There may be little difficulty in towns and cities, where there are business or banking hours, in deciding that a demand should be made during those hours. But in places where no particular hours are known for making and receiving payments there is more difficulty in determining what would be a reasonable hour for this purpose. It may often happen that the party having a payment to make would appropriate the earlier part of the day to obtain the means, either by collecting, or by procuring a loan from a bank or from some person in a neighboring town. To establish a rule that would deprive him of that

[29] Arguments of counsel are omitted.

opportunity and subject him to a suit, and that would render him liable to have his business broken up, while thus employed, might justly be regarded as unreasonable. The general rule being that the party has all the day to make his payment, that in relation to bills and notes should not be so varied as to prevent his having a fair opportunity to make arrangements and provide the means of payment before he is subjected to a suit. In this case the demand was made at an hour so early as to deprive him of that opportunity; and it was not therefore made at a reasonable hour.[30]

Exceptions overruled.

DANA v. SAWYER.

(Supreme Judicial Court of Maine, 1843. 22 Me. 244, 39 Am. Dec. 574.)

The action is on a promissory note signed by T. Sawyer & Co., dated December 24, 1838, for $202.50, on four months, payable to and indorsed by the defendant. The case was submitted on an agreed statement of facts. The court were to enter a nonsuit or default, as they might determine the law in the matter.[31]

SHEPLEY, J. This case is presented upon an agreed statement of facts, from which it appears that a demand for payment was made upon the maker of the note, between 11 and 12 o'clock at night on the day that it became payable, by calling him from his bed, and that he did not pay it. There is no further statement of anything else said or done, except that a notice and demand for payment was left with him. When a bill or note is payable at a bank, banking house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intended to conform to such established course of business, and requires that a demand should be made during those business hours. Parker v. Gordon, 7 East, 385. The cases of Garnett v. Woodcock, 1 Starkie, 475, and of Henry v. Lee, 2 Chitty, 124, may show an exception to this rule, that, when a person is found at such place after business hours authorized to give an answer, the demand will be good. While it may be difficult to reconcile these cases with the case of Elford v. Teed, 1 M. & S. 28, when the bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. Leftley v. Mills, 4 T. R. 174; Barclay v. Bailey, 2 Campb. 527; Triggs v. Newnham, 10 Moore, 249; Wilkins v. Jadis, 2 B. & Ad. 188. What hour may be a reasonable

[30] The maker of a note payable at a bank has until the close of banking hours to provide funds at the bank for payment (German-American Bank v. Milliman, 31 Misc. Rep. 87, 65 N. Y. Supp. 342 [1900]); and an action may not be brought against either him or the indorsers until the day after the day of maturity (Kennedy v. Thomas, [1894] 2 Q. B. 759 [C. A.]).

[31] The statement of the case is abridged.

one has come under consideration in those cases. In the first of them Mr. Justice Buller observes that "to say that the demand should be postponed till midnight would be to establish a rule attended with mischievous consequences." In the second Lord Ellenborough said: "If the presentment had been during the hours of rest, it would have been altogether unavailing." In the third this remark, among others, is quoted and approved by Chief Justice Best. In the fourth, Lord Tenterden remarked that "a presentment at 12 o'clock at night, when a person has retired to rest, would be unreasonable." These observations, so just and so applicable to this case, authorize the conclusion that the demand was not made at a reasonable hour, unless the fact that the maker was seen and actually called upon at that time should make a difference. Perhaps, in analogy to the exception already noticed, it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed statement to show that payment might not have been refused because the demand was made at such an hour that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety.

Plaintiff nonsuit.

BANK OF SYRACUSE v. HOLLISTER.

(Court of Appeals of New York, 1858. 17 N. Y. 46, 72 Am. Dec. 416.)

Appeal from the Supreme Court. The action was against John Hollister as indorser of a promissory note, made by F. Hollister, April 6, 1851, for the payment of $2,750, one year after date, at the Bank of Utica.

The trial was had at the Onondaga circuit, before Mr. Justice Allen, without a jury. It was proved that on the 9th of April, 1852, when the note became due, it was brought by a clerk of the plaintiff to the paying and receiving teller of the Bank of Utica, who was also a notary public, at his boarding house in that city, at half past 6 in the evening, and delivered to him for collection or protest. He went to the bank, found the outer door locked, and could not obtain admission. The notary and teller testified that thereupon "I made a demand of payment of the note of myself, standing on the steps before the outer door of the bank, and then went to my boarding house and made out the notice of protest, and deposited it in the post office before 7 o'clock, the mail leaving at 8, directed to John Hollister, Buffalo, Erie County, his place of residence." He further proved that F. Hollister, the maker of the note, had no funds in the bank, and that no one called at the bank to pay the note, or inquired for it, during business hours, which closed at 4 o'clock p. m.

The judge held that there had been no sufficient demand of payment, and ordered judgment for the defendant, which having been affirmed by the Supreme Court at General Term in the Fifth District, the plaintiff appealed to this court.

HARRIS, J. Two questions are involved in the decision of this case: First, relating to the time of presenting the note for payment; second, the manner of presentment.

As to the time: The note was payable at the Bank of Utica. By making it thus payable, the maker agreed that the note should be paid during the usual business hours of the day upon which it matured. The holder also agreed that the note should be presented for payment within the same time. In giving effect to the contract the law presumes that the parties intended to conform to the known and established course of business at the place where their contract was to be performed. The general rule, therefore, is that, where the note is payable at a bank, it must be presented for payment before the usual hour of closing the banking house.

Thus, in Parker v. Gordon, 7 East, 385, a bill was payable at a banker's, whose usual time for closing his shop was 6 o'clock. The bill was presented after that hour. The shop was closed and the clerks gone. In an action against the drawer of the bill, it was held that the presentment was not sufficient.

But though the presentment is made after business hours, it will be sufficient, if a proper person be found at the place to give an answer. In Garnett v. Woodcock, 1 Starkie, 475, the bill was payable at a banker's in London. It was presented for payment in the evening of the day when it became due. A boy returned for answer, "No orders." Lord Ellenborough said, upon the trial: "I think it perfectly clear that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient, if made before 12 at night." So, where a draft, payable at the bank, "was presented for payment in the afternoon of the last day of grace, after regular banking hours, and the cashier of the bank, being there, refused payment, because there were no funds there belonging to the acceptor, it was held that the cashier, whose duty it was to attend to business of this sort, being at the bank, and having returned a negative answer, and it appearing that the acceptors had provided no funds, the demand was sufficient. Flint v. Rogers, 15 Me. 67; Bank of Utica v. Smith, 18 Johns. 230; Henry v. Lee, 2 Chit. 124. In the latter case, Lord Ellenborough said, in answer to the objection that a bill had been presented after business hours: "In general, it is not sufficient. It will not do, if nobody is there to receive; but if somebody is there, and the person presenting the bill gets an answer, it is sufficient." Bayley, J., also said: "If it is presented after the usual hours, it is at the peril of the person presenting it; for if nobody is there, it will not do, but if there is, then it is immaterial at what time it is presented." The latter judge, in his Treatise on Bills, also says: "A presentment at a banker's, out of the

usual hours, will be unobjectionable, if the banker, or any agent on his behalf, were there at the time of such presentment." Bayl. on Bills (Am. Ed. 1836) 212. So, also, Chitty says: "A presentment at any time in the day or evening is sufficient, if an answer be given by an authorized person." Chit. on Bills, 278. It was not too late, therefore, to present the note for payment at half past 6 o'clock, if an authorized person could be found at the bank to give an answer.

We are therefore next to consider the manner in which the note was presented. It had been delivered to the teller of the bank, he being a notary, for the purpose of demanding payment and giving notice to the indorser. He was the very officer to whom the note should properly have been presented for payment. He was the person of whom the maker of the note should have inquired for the note, if he had come to pay it. If the money had been deposited to meet the note, he would have received it. He had been at the counter of the bank during the business hours of the day. He knew, and testified, that no person had inquired for the note, and that the maker had no funds in the bank. What, under such circumstances, was it necessary for the teller to do, in order to charge the indorser? He was the agent of the holder of the note to demand payment, and was at the same time the proper officer of the bank to answer the demand, either by paying the note or refusing to pay. Had funds been provided to meet the note, he would have paid it. Knowing the fact that there were no funds, the teller, nevertheless, went to the banking house, and, finding the outer door locked, made a demand of payment of himself as the paying officer of the bank. Had he unlocked the door and entered the building, he being the person authorized to pay or refuse payment, it could not have been doubted that the demand was sufficient. This, of course, would have been an idle ceremony. The teller knew this, and therefore abandoned his attempt to enter the bank. I think, however, he did enough to satisfy the condition upon which the indorser was to become liable. Suppose the note had been delivered to the teller before the close of banking hours, he would have had nothing to do but to give notice of nonpayment. No formal demand would have been required. It would have been enough for him to be satisfied, either from his own knowledge of the fact, or an examination of the books of the bank, that there were no funds there to pay the note. Suppose that, when he went there, the teller had gained admission, he would then have had nothing to do but return back and give the appropriate notice to the indorser. No proclamation, no clamorous demand, was required.

This view of the question is, I think, abundantly sustained by authority. In Saunderson v. Judge, 2 H. Bl. 509, the action was against the indorser of a note payable at the house of Saunderson & Co., into whose hands the note had come by indorsement. On the day upon which the note fell due, they wrote to Judge, the indorser, giving him notice of the nonpayment. It was held that, as they, at whose house

the note was to be paid, were themselves the holders of it, it was sufficient demand for them to turn to their books and see the maker's account with them, and a sufficient refusal to find that he had no effects in their hands.

In Bank of the United States v. Carneal, 2 Pet. 543, 7 L. Ed. 513, the action was upon a note held by the bank and payable there, and which was in the bank on the day it became due. After the usual banking hours were over, the note was delivered to the notary for protest; the officers of the bank at the same time informing him that there were no funds there for the payment of the note. This was held to be sufficient proof of a due demand of payment. Story, J., said: "Where the bank is itself the holder of the note, no formal demand is necessary." Fullerton v. Bank of the United States, 1 Pet. 604, 7 L. Ed. 280, is to the same effect. In the latter case it was said: "Modern decisions go to establish that, if the note be at the place on the day it is payable, this throws the onus of proof of payment upon the defendant."

In Gillet v. Averill, 5 Denio, 85, the teller of the bank where the note was payable testified that on the day the note fell due he drew the note from the package where it was kept, and, knowing that the maker had no funds there, he gave notice of nonpayment to the indorsers, without any formal demand of payment or actual examination of the maker's account. This was held to be a sufficient presentment. Ogden v. Dobbin, 2 Hall, 129; Berkshire Bank v. Jones, 6 Mass. 524, 4 Am. Dec. 175. I am of opinion that enough was done by the notary, to constitute a legal presentment and demand of payment.[32]

Judgment reversed.[33]

COLUMBIAN BANKING CO. v. BOWEN.

(Supreme Court of Wisconsin, 1908. 134 Wis. 218, 114 N. W. 451.)

See ante, p. 576, for a report of the case.

III. PLACE

BOOT & BENTLEY v. FRANKLIN.

(Supreme Court of New York, 1808. 3 Johns. 207.)

This was an action of assumpsit by the indorsee against the drawer of a bill of exchange. The bill was drawn in favor of Franklin, Robinson & Co. on Messrs. Rathbone, Hughes & Duncan, of Liverpool,

[32] Compare Chicopee Bank v. Bank, 75 U. S. 641, 19 L. Ed. 422 (1869).

[33] See Salt Springs Bank v. Burton, 58 N. Y. 430, 17 Am. Rep. 265 (1874).

payable in London, being similar to the one mentioned in the preceding case.

The declaration, after stating a presentment to the drawees at Liverpool, their refusal to accept and the consequent protest, proceeded as follows: "That afterwards, to wit, on the 5th of November, 1807, being the day on which the said bill became payable, according to the custom of merchants at London, the plaintiffs not having received payment of the said bill or any part thereof, and not knowing where to present the same for payment in London aforesaid, where the same is made payable, they caused the said bill to be protested for nonpayment at London, according to the said custom of merchants; of all which said premises the said defendants afterwards, to wit, on the 30th of December, 1807, at the city of New York, had notice. By reason whereof," etc.

There was a special demurrer to the declaration, and joinder in demurrer.[34]

KENT, C. J., delivered the opinion of the court. The declaration in this suit varies from the one in the former cause in these particulars only, viz.: It states that, after the bill was protested at Liverpool for nonacceptance, it was, when payable, protested at London for nonpayment, with an averment that the holders did not know where to present the same for payment in London; and it then avers that of all the premises the defendant had notice.

The special demurrer to this declaration states that the plaintiffs have not alleged that the bill was presented to the drawees for payment, nor that the plaintiffs endeavored to find the drawees, or made inquiry, or search for them.

Upon the argument, the declaration was objected to as bad, in matter of substance, for the want of a distinct averment that the defendant had notice of the nonacceptance. The answer to this objection is that the general averment of notice of all the antecedent premises was sufficient, and is conformable to approved precedents. The reasonableness of the notice, either of the nonacceptance or nonpayment, is a question that cannot arise upon the pleadings. It depends upon the testimony to be disclosed at the trial. The other objection stated as a cause of demurrer has been anticipated, in a great measure, by what was observed in the former case. It was not incumbent upon the plaintiffs to state that inquiry was made in London for the drawees: "Lex neminem cogit ad vana seu inutilia." No place in London being pointed out to which the holders might resort, and the drawees residing at Liverpool, an attempt to search for them in such a city as London would have been without any object or effect. Nor were the holders bound to go elsewhere to seek the drawees, as the bill had directed the payment to be in London. They conformed their conduct to the tenor of the bill. They were in London on the day of payment, ready

[34] The arguments of counsel are omitted.

to receive payment, and they did all that they were enabled to do. They caused the bill to be there protested. The declaration in this case also states sufficient to entitle the plaintiffs to recover.

Judgment for the plaintiffs.[35]

BANK OF ORLEANS v. WHITTEMORE et al.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1859. 12 Gray, 469, 74 Am. Dec. 605.)

Action on contract by an incorporated banking company in Vermont against the firm of W. & F. H. Whittemore & Co., as second indorsers of the following promissory note:

"$1,000. Boston, May 1, 1855.

"Twelve months after date I promise to pay the Commercial Mutual Marine Insurance Company, or order, for value received, one thousand dollars. Wm. P. Moore."

The case was submitted to the superior court of Suffolk, and, on appeal, to this court, upon certain depositions which showed the facts to be as follows:

The note was made in Boston on the day of its date, but the maker's home and place of business then and ever since were at Newbern in the state of North Carolina. In March, 1856, the plaintiffs, through the agency of Ezra C. Hutchins, of Boston, who was employed by their president, and by him furnished with money for that purpose, bought the note after it had been indorsed by the payees and by the defendants. It did not appear that the plaintiffs knew where the maker resided, except that he lived out of the city. On the 24th of March, 1856, the plaintiffs' cashier sent the note to Hutchins, with no instructions or explanation besides these words: "I enclose for collection and deposit in Suffolk Bank: Wm. P. Moore, due May 1–4." Hutchins then knew the maker's residence and place of business. On the 24th of April following the cashier sent the note to the Merchants' Bank of Newbern, whose cashier returned it, not protested, to Hutchins, in a letter dated April 30th, saying: "Your letter of the 24th

[35] "The note is by its terms payable at the place where it is dated. But it is payable there generally, with no designation of a particular place therein at which payment shall be made or sought. In such case the note must be presented and payment asked for at the place of business therein of the maker if he has one; and, if he has no place of business, then at his place of residence. Woodworth v. Bank of America, 19 Johns. 391, 10 Am. Dec. 239; King v. Holmes, 11 Pa. 456. And if he have neither place of business nor of residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand." Folger J., in Meyer v. Hibsher, 47 N. Y. 265, 270 (1872).

An instrument payable at a particular place—e. g., a bank—must be there presented. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093 (1904); Schleisinger v. Schultz, 110 App. Div. 356, 96 N. Y. Supp. 383 (1905).

instant with one enclosure as stated is received, and which enclosure I return herein as below. Note of Wm. P. Moore, $1,000. Exchange is so scarce that I could not remit, if paid." The 4th of May was Sunday. Hutchins received this letter and the enclosed note on the 5th of May, and immediately informed the defendants, and asked them to waive demand and pay it; but they declined to do so, and Hutchins on the same day sent the note back to Newbern, where, on the 12th of May, it was presented by a notary public to Moore for payment, which he refused, and the note was duly protested and notice thereof sent to the defendants, who received it on the 17th of May.[36]

METCALF, J. (after stating the facts as above). On these facts, the question is whether the defendants are liable as indorsers. If they are, it is not because seasonable demand was made on the promisor and seasonable notice of nonpayment given to them. The note fell due on Saturday, May 3d—the last day of grace being Sunday—and no demand was made on the promisor until nine days afterwards. This delay discharged the defendants from their liability to the plaintiffs, unless the fact that the promisor always resided in North Carolina excused the holders from making personal demand on him, or from using due efforts to make such demand. The plaintiffs rely on this fact to sustain their action, and cite the decision in Smith v. Philbrick, 10 Gray, 252, 69 Am. Dec. 315, as conclusive in their favor. That was an action by an indorser against a prior indorser of a note made in Boston by one whose only residence and place of business were in Texas, and on whom no demand was made; and it was decided that no demand on him was necessary to charge the defendant. The court said there was no evidence to show whether the plaintiff, or any subsequent holders of the note, knew where the promisor's residence was; that if his residence had been known to the holder, at the maturity of the note, it might perhaps have been incumbent on him to forward it to Texas for presentment, as was held in Taylor v. Snyder, 3 Denio (N. Y.) 145, 45 Am. Dec. 457.

In the case before us, the plaintiffs' agent, whom they employed to purchase and also to collect the note, knew where Moore's residence was; and the legal effect of his knowledge of that fact is the same as would have been the effect of their knowledge of it. Notice to an agent, whilst he is concerned for the principal, is notice to the principal himself. And we are of opinion, as intimated in Smith v. Philbrick, that, by reason of the plaintiffs' knowledge (through their agent) of the place of Moore's residence, a demand on him there, and seasonable notice of his default, were prerequisites to the defendants' liability as indorsers. We think this case is within the general and familiar rule which applies to the holders of indorsed notes, and not an exception to that rule.

[36] The arguments of counsel are omitted.

When a resident in the state, after giving a note, removes from the state and takes up a residence out of the state, it has been repeatedly decided that it is not necessary, in order to charge an indorser of the note, to demand payment of the promisor at his new residence. This exception to the general rule which requires demand on the promisor, and notice to the indorser, seems to be established. But we see no sufficient reason for taking the present case out of that rule. And we hold that where the maker of a note, when it is made and indorsed, has a known residence out of the state, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of nonpayment given to the indorser before the indorser can be charged. So it was decided by the Court of Appeals in New York, in Taylor v. Snyder, before referred to, and in Spies v. Gilmore, 1 Comst. (N. Y.) 321. In this last case, Bronson, J., said: "The only excuse which has been offered for not making demand is that it would have been inconvenient to go or send to Matamoras for the purpose. It is often inconvenient to present the note for payment, when the maker and holder both reside in the same state; and yet, when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting demand. And this is so, however wide asunder the maker and holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New York, or got an indorsement with a waiver of demand. He has no right to change the contract which the indorser made, for the purpose of promoting his own convenience."

Judgment for the defendants.

HOLTZ v. BOPPE.

(Court of Appeals of New York, 1868. 37 N. Y. 634.)

BACON, J. The only question presented by this case is whether the defendant was properly charged, as indorser of the note in suit, by a due presentment and demand of payment of the same of the makers. The note was made by Hartman & Ilch, who were partners in business, and was payable six months after date, but specifying no place of payment. The demand of payment was consequently required to be made of the makers personally, or at their dwelling place or place of business. Story on Bills of Exchange, § 362; Taylor v. Snyder, 3 Denio, 145, 45 Am. Dec. 457.

On the subject of the demand, the referee finds the following facts. We assume the facts as settled by the report—do not look out of it

to find any other state of facts than such as are found by him: Prior to the 26th of October, 1860, the makers resided and carried on business at No. 622 and 624 Broadway, in the city of New York; and on or about that day they hired the basement of the building at the corner of Bowery and Division street, in said city, for the purpose of carrying on business there, removed a portion of their furniture and property to that place, and occupied it for a month, and partially fitted up the premises for their business. Before the 3d of November, on which day the note fell due, they informed the plaintiff they were about to remove to said basement, and they were seen there by the plaintiff before that day. A few days only before the note fell due, both the makers changed their private residences, one of them moving twice between the 23d of October and the 5th of November. The plaintiff lived at Hoboken, in New Jersey, and it did not appear that he had any knowledge of these changes of residence, or that he was apprised of anything but the fact communicated to him by the maker, in the presence of the defendant, that they had removed their place of business to the basement aforesaid.

The person who made the demand, having received instructions to that effect, went with the note, on the day it fell due, to the basement on the corner of Bowery and Division street, and found it closed and no person therein. He then made inquiry in the vicinity for the makers, but was unable to find them, or either of them. From there he went immediately to No. 622 and 624 Broadway, where the sign of the firm was still up, and made inquiry there and in the vicinity, but could not find them, or either of them, or any person to answer for them or obtain any information in respect to their residence, or the place to which they had removed. He then protested the note, stating that after diligent search he was unable to find the makers, and sent due notice to the defendant, by mail, at his place of residence. On the facts, the referee found as a conclusion of law that the note was duly presented for payment and notice given, and judgment was rendered thereupon against the defendant for the amount of the note and interest.

Assuming these facts, as we do, from the findings of the referee (and they are amply sustained by the evidence), I think his conclusion was entirely right. The rule that requires a demand in such a case to be made personally, or at the residence or place of business of the makers, is satisfied if due and reasonable diligence is used to ascertain such residence or place of business. In this case, such diligence seems to me to have been employed. The makers of the note, by their own statement to the holder of the note, located themselves at the basement designated by them. They, in fact, vacated the premises theretofore occupied by them, and were, on the 3d of November, so far as they were carrying on business at all, in the use and occupation of the basement at the corner of Bowery and Division street. In addition to a demand at this place, the notary also called at the former

place of business and residence of the makers, and at both places and in the vicinity of each made inquiries for the parties, from which he could derive no information as to the whereabouts of either of them. I do not well see what greater diligence he could have employed. A search in the directory would have been of no avail, since the change of residence had been so recent that it would have afforded no aid; and if the inquiry and search had been limited to the directory, it would clearly have been insufficient. Packard v. Lyon, 5 Duer, 82. I am unable to perceive any track of inquiry or investigation that could have been pursued that would have been rewarded by a discovery of the then actual residences of these parties, and am of the opinion that all the diligence the case called for, or the law exacts, was employed by the notary in making the demand of payment.

The judgment should be affirmed.

BROOKS v. BLANEY.

(Supreme Judicial Court of Maine, 1873. 62 Me. 456.)

Assumpsit upon a note dated May 1, 1869, for $250, signed by Cyrus Smith, payable in six months from date to the order of Arnold Blaney, which came to the plaintiff as indorsee thereof. The defendant pleaded the general issue, and the case was then submitted to the full court upon the note, notarial protest, and the deposition of the notary, to enter such judgment as the case required. The protest alleges a presentment of the note on the last day of grace, at "the late place of business of the signer of the note." In his deposition the notary says he inquired for Smith at his last place of business in Boston, but could not find him there, nor learn his whereabouts, but that he presented the note for payment at that place. He says he then looked in the directory, "and found where he [Smith] resided," went to the house indicated, and "did not find the promisor in. I presented the note and asked if the promisor was in, and if any money was left for the note. The answer was that he was not in, 'don't know where he is,' and that there was no money left. That is all the information I got there." He then sent the defendant a notice of dishonor.[37]

BARROWS, J. A protest setting forth a presentment "at the late place of business" of the promisor "to the person there in charge," who answers the demand of payment by saying, "The promisor is not here now, nor have we any funds for the note," is not sufficient proof of presentment and demand to charge an indorser.

Failing to find the present place of business or residence of the maker of the note, the notary should seek him elsewhere. Freeman v. Boynton, 7 Mass. 483.

[37] Part of the opinion is omitted.

In the present case the notary testifies that, after making further and diligent search and inquiry for him at several places mentioned, in Boston, where the note was dated, and after visiting another person of the same name whose place of business was near by, he ascertained by the directory where the maker of the note resided, and went to his residence as there indicated and inquired if the promisor "was in," and received an answer in the negative, and, to further inquiry, that the person answering did not know where he was; that he presented the note, but was informed that no money was left to pay it. He further testifies that he notified the indorser, and states the contents of the notice which he sent. No testimony is offered by the defendant; but his counsel suggests that the testimony of the notary fails to prove a proper presentment and demand of payment; that it does not appear that the place indicated in the directory was the actual place of residence of the promisor at the time the note fell due. But we think, in the absence of any testimony tending to repel the inferences to be drawn from the acts of the notary and the replies which he received at the place which he speaks of as the promisor's residence, it may be fairly concluded that the demand was made at the place where the promisor then resided, and that sufficient effort to find his place of business, and present the note to him personally, was previously made.

Where no place of payment is specified on the note, a presentment at the residence of the maker will suffice, even though he be out of town at the time. Moodie v. Morrall, 1 Mill, Const. (S. C.) 367. See, also Whittier v. Graffam, 3 Me. 82. * * *

Defendant defaulted.

KING v. CROWELL.

(Supreme Judicial Court of Maine, 1873. 61 Me. 244, 14 Am. Rep. 560.)

Assumpsit against the defendant as indorser of the following promissory note, his signature admitted to be genuine:

"$150.00. April 8, 1871.

"Four months after date I promise to pay to the order of A. J. Crowell one hundred and fifty dollars. Value received.

"H. E. Morton."

Indorsed: "A. J. Crowell. Jeremiah Glidden. C. H. Glidden."

Writ dated February 17, 1872. Plea, general issue.

This note was negotiated to the plaintiff for a full consideration a short time after its date.

The maker and the indorsers resided in Winthrop village, and the plaintiff in Monmouth. H. E. Morton, at the time of the making of the note in question, was a manufacturer of boots and shoes, and a dealer in boots, shoes, hats, and caps, and had a store and place of business in said Winthrop village. On the 3d day of July, 1871, the

maker failed in business. His real estate and goods were attached on that day, and his place of business closed; the attaching officer taking possession of the keys and the goods. On Friday, the morning of August 11, 1871, the plaintiff went to Winthrop for the purpose of collecting this note, or of taking the necessary steps to hold the indorsers. He went to the store recently occupied by the maker of the note, and, finding it closed, he went directly to Morton's house, with the note in his possession, for the purpose of making a demand of payment. Morton was not at the house; but the plaintiff was informed he was on the street, where the plaintiff found him about 10 o'clock a. m., and then and there requested payment of the note of said Morton, which was refused. About two hours afterwards, on the same day, the plaintiff sought the defendant, told him he had demanded payment of the note of Morton, that he refused to pay it, and informed him (defendant) that he should look to him, as indorser, for the payment of the note. The defendant replied that he would look into the matter, and, if he found that he was holden, would see the note paid in two or three weeks. In two or three weeks the plaintiff called on the defendant again for payment, when the defendant refused to pay, saying that he had inquired carefully into his liability as indorser of this note, and was advised that he was not liable, and should not pay the same.

It was agreed that upon the above facts the full courts should enter such judgment as the law required.

If the action could be maintained, defendant to be defaulted; otherwise, plaintiff to become nonsuit.[38]

VIRGIN, J. When the defendant indorsed and put into circulation the note in suit, he thereby ordered the maker to pay the amount therein specified to the plaintiff; and he also thereby promised that if the note were duly demanded of the maker, and not paid, then he himself would, upon receiving due notice of the demand and nonpayment, pay it to the plaintiff.

And now, in this suit upon his promise, the defendant declines to pay the note on the following alleged grounds:

1. That the demand was not lawful, inasmuch as it was made on the street.

The general rule of law is that the holder must use diligence to find the maker and demand payment of him; and the inquiry will be whether, under the circumstances of the case, due diligence has been used. 3 Kent, Comm. 129.

It is familiar law that when a promissory note payable generally, and not at a specified place, is seasonably demanded at the maker's known and settled place of business for the transaction of his moneyed concerns, it is sufficient to hold the indorser. And the same may be said of a like demand made at his place of residence. Neither does

[38] The arguments of counsel and part of the opinion are omitted.

it make any difference whether the maker be personally present or temporarily absent at the time of the demand. In either case, the law has for many years been constant in declaring that the evidence afforded by such a demand constitutes full proof of due diligence on the part of the holder.

But in the case at bar the plaintiff went still further than the technical exactions of the law required. He was a resident of Monmouth. On the day the note became due he went to Winthrop village, where both the maker and the defendant resided, "for the purpose of collecting this note, or of taking the necessary steps to hold the indorser." On going to the store which had been occupied by the maker as his place of business, he found it had been closed and in the possession of an officer more than 30 days; that the maker had failed in his business, and that all his property was under attachment. Thereupon the plaintiff went to the maker's place of residence, where he was informed that the maker was not at the house, but had gone out on the street. Had he gone through the ceremony of demanding payment of the note at the house, while the maker was out on the street, the law would pronounce the plaintiff's diligence ample. But, not finding the maker at home, the plaintiff trebled his diligence, sought and found him on the street in that country village, and then and there requested payment of the maker personally, which was refused.

It does not appear (as it would be likely to, if true) that any objection to the place of demand was made by the maker. If he had had funds with which to pay, not with him, but at his house, he would at once have said so. If he had objected to the place, and requested the plaintiff to accompany him to his house, and receive the money due on the note, and the plaintiff had declined so reasonable a request, the legal aspect of this branch of the case might thereby have been materially changed. But no such facts exist. He simply refused payment, and, in all human probability, for the real, though to him, perhaps, unpleasant, reason that all his property was in the custody of the law, and he had in fact nothing wherewith he could pay. It would seem that such a demand would be more satisfactory to all concerned than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence. And we have no hesitation in declaring the demand sufficient under the circumstances, so far as the place is concerned, to charge the defendant.

We are aware that Byles on Bills, 196, declares that a demand made on the street is not sufficient. Such is the doctrine expressed, too, in the author's notes in Leading Cases on Bills, 327, 328. And there are several cases containing the dictum in general terms that a demand must be made either at the maker's place of business or place of residence. But our attention has been called to no case, neither have we, after considerable research, been able to find any, wherein the court having the question before it decided adversely to a demand made on the street, under circumstances similar to those in this case.

On the other hand, Judge Story, in discussing the law applicable to notes like this, uses the following language: "The general rule is that the presentment for payment may be made to the maker personally, or at his dwelling house or other place of abode, or at his counting house or place of business. It seems a presentment may always be made personally to the maker, wherever he may be found, although he may not be either at his domicile or at his place of business." And he cites quite a large number of cases, in a note, as authority. Story, Prom. Notes, § 235. In Edw. Bills (2d Ed.) 150, is found the following: "Being made payable at large, it is due at any and every place; but, for the purpose of charging the indorser, it must be presented to the maker personally, or at his residence or place of business. If it be made payable at a particular place in the city, it is necessary to present the note there for payment, for the purpose of charging the indorser. But, even in this case, if a personal demand is made upon the maker, and no objection is made by him as to the place, it is sufficient." So in 3 Kent's Comm. 128: "Demand of payment must be made by the holder or his agent upon the acceptor at the place appointed for payment, or at his house or residence, or regular known place of his moneyed business, or upon him personally if no particular place is appointed." And again, on page 96: "If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand."

And Prof. Parsons says: "In general, a personal demand would be sufficient, if made at any place where the maker may reasonably be expected to be in condition to pay; and if made in any other place—such, for instance, as in the street—it would usually be good, unless objection were made to payment because the place was an improper one, or some similar reason were given for the refusal." 1 Pars. Notes & B. 421. And he uses somewhat similar language on page 372.

The doctrine, as stated above by Judge Story, is approved in Taylor v. Snyder, 3 Denio (N. Y.) 145, 45 Am. Dec. 457, published as a leading case in Leading Cases on Bills, 313, 316.

Finally, our own court held that where a note signed by two, made payable at their dwelling houses, was demanded of them, together, at the barnyard of one of them, and no objection was made as to the place of the demand, the demand was sufficient. Baldwin v. Farnsworth, 10 Me. 414, 25 Am. Dec. 252.

2. But the defendant, further objecting to the sufficiency of the demand says: "As the payer has a right to require its delivery up to him before he pays, and may insist that the holder produce it, the note should have been exhibited."

It is true that the rule requiring the person making the demand to exhibit the evidence of debt is well settled, and well grounded in reason; and, although applicable to all written contracts on which a demand is necessary, it is, as has been well said, especially applicable to negotiable securities, which may be legally transferred to another at

the very time the original payee makes the demand. But the reasons applicable to cases in which the maker offers to pay cannot apply to cases in which he not only does not offer, but absolutely refuses, to pay, and does not even express any desire to see the note.

The idle ceremony of producing the note when the maker unqualifiedly refuses to pay is well illustrated by Shaw, C. J., in Gilbert v. Dennis, 3 Metc. (Mass.) 497, 38 Am. Dec. 329, where he says: "Even under the law of tender, which is extremely strict, it is held that, where a party to whom a tender is to be made declares that he will not accept it, an actual production and offer of the money is not necessary."

The case finds expressly that the maker had the note in his possession when he made the demand. We think the objection cannot prevail. Arnold v. Dresser, 8 Allen, 435; Freeman v. Boynton, 7 Mass. 485; Etheridge v. Ladd, 44 Barb. (N. Y.) 69.[39] * * * Defendant defaulted.

SECTION 4.—PROTEST

COMMERCIAL BANK OF KENTUCKY v. WILLIAM H. BARKSDALE & CO.

(Supreme Court of Missouri, 1865. 36 Mo. 563.)

This was a suit instituted March 13, 1861, on a bill of exchange, dated at St. Louis, Mo., September 4, 1860, made by William H. Barksdale & Co., in favor of John F. Darby (acceptance waived), on the Park Bank, New York City, for $10,000 at four months, indorsed by Darby. The petition averred due protest and notice; also that William H. Barksdale & Co. had no funds at the Park Bank, and that Darby knew this at and before the maturity of said bill.

Defendants, William H. Barksdale & Co., denied that the bill was duly presented at maturity to the Park Bank for payment, or that such payment was refused, or that the bill was duly protested for nonpayment, or that defendants had any due or legal notice of any such facts.

The case was tried before the court, sitting as a jury, on the 24th January, 1863, and judgment was given for the defendants.

By the bill of exceptions, it * * * appeared that the bill was protested on the 5th January, 1861; that payment was demanded by Turney, a notary; that the protest was by Varnum, notary public, and that after the commencement of this suit Turney made out a notarial

[39] Compare Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802 (1908), affirmed 132 App. Div. 948, 118 N. Y. Supp. 1108 (1909), where a demand of payment made over the telephone was held sufficient, in the absence of objection by the maker of the note.

act of protest, dating it back to January 5, 1861; * * * that Turney and Varnum were partners. The court refused the following instruction which was requested by the plaintiff: "(9) It is not necessary to the validity of a certificate of protest that it be drawn up on the day of demand and refusal of payment, nor is it necessary that such certificate, or a copy thereof, should be sent with the notice. It may be drawn up when called for, or at any time before trial, provided the bill was properly presented for payment by a notary public at the request of the holder, and payment demanded and refused, and a proper notice of the protest is given and in due time."

The court gave the following instructions at the request of the defendants: "(3) To make a valid presentment by a notary, it is necessary that such notary make a personal presentment and demand; and a protest of a bill by a notary who did not make such presentment and demand is insufficient to hold the indorser." [40]

HOLMES, J., delivered the opinion of the court.

The decision of the case turns mainly upon the validity of the protest. The bill is to be considered as a foreign bill. St. Bills, §§ 22, 23. In cases of foreign bills of exchange, the rule is too well settled to admit of question that there must be a protest of the bill by a notary public, in all places where such officer is at hand. Sto. Bills, § 276. The notarial protest is evidence of presentment, demand, and refusal to pay the bill, at the time and in the manner therein stated. This rule of the law merchant is recognized by statute in this state (Rev. St. 1855, p. 298, § 20); and so essential is the production of a protest in all cases of foreign bills that this evidence of presentment, demand and refusal cannot be dispensed with, nor supplied by other evidence of the same facts, as may be done in cases of inland bills. Sto. Bills, § 276. It is equally well established that the presentment and demand must be made in person by the same notary who protests the bill. It cannot be done by a clerk, nor by any other person as his agent, though he be also a notary. The protest is to be evidence of the facts stated in it, of which the notary is supposed to have personal knowledge, and credit is given to his official statements by the commercial world on the faith of his public and official character.

In court, the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only, if the notary were himself upon the stand as a witness. The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another. Edw. on B. 466; Leftley v. Mills, 4 T. R. 174; Carmichael v. Bank of Penn., 4 How. (Miss.) 567, 35 Am. Dec. 408; Sacrider v. Brown, 3 McLean, 481, Fed. Cas. No. 12,205; Onondaga Co. Bank v. Bates, 3 Hill (N. Y.) 53; Chenowith v. Chamberlin, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145. The presentment and protest are governed by the law

[40] The statement of the case is abridged, and part of the opinion omitted.

of the place where the bill is payable, and on this principle, it has been held that where the statute law of the state (as in Louisiana) authorizes notaries to appoint deputies, a protest made by such deputy, duly appointed, would be recognized as sufficient. Carter v. Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89. But no case seems to have gone farther than this: Such deputy may be considered as having a semi-official character, and sufficient authority by force of the statute; but without some change in the general rule of law, one notary can neither delegate his functions nor impart his own official character to another. Here, two notaries were in partnership in general business, and one of them undertook to present the bill and make the demand, and the other to draw up the protest and give the notice. They were both notaries, but as such they were distinct public officers, and there can be no partnership in such matters. No law or custom was proved to have existed in the state or city of New York which changes the general rule of the law merchant on this subject.[41] It must follow that the protest made by Varnum can have no validity; nor will that made by Turney any more avail. It seems to be clearly established by the general current of authority that the protest must be made on the same day with the presentment and demand, though a noting of the protest on the bill itself may be regarded as an incipient protest, or preliminary step towards a protest, which may be completed afterwards, at any time, by drawing up the protest in form. Here there was no noting of the bill for protest, nor any memorandum marked on the bill, by Turney; nor is there any proof of any distinct note, entry, or memorandum of protest, made by him on that day, in any other way than upon the bill itself. It would appear that he did not make the demand for the pur-

[41] "In the absence of any established rule of law in this state, by decision of the court or by any statute, requiring a demand to be made by the notary in person, it is not perceived why a usage such as was approved was not admissible as proof upon the subject. * * *

"The practice in England is to present and demand by a clerk of the notary, and we are not referred to an English authority holding such presentment illegal where the usage so to present was established.

"Chitty on Bills, in his last edition (10th Eng. Ed. 355, note 4), sustains this usage, and says it is not questioned in any English case, and 'is amply justified by the law of principal and agent.' I take this from 1 Par. on Bills, 360, as this edition of Chitty is not accessible to me. This is said after correspondence upon and examination and discussion of the subject, and is free from the doubt in other editions, based chiefly upon a doctrine of Mr. Justice Buller, in Leftley v. Mills, 4 T. R. 175, an action on an inland bill.

"In Brookes' Notary of England (3d Ed.) 71, published in 1867, it is stated: 'Before the protest is made it is the custom in England to cause the bill to be presented either by a notary or by his clerk (in general his clerk presents it), and acceptance to be demanded.' As to the admission of usage, see Nelson v. Fotterall, 7 Leigh (Va.) 179; Miltenberger v. Spaulding, 33 Mo. 421; Commercial Bank of Kentucky v. Barksdale, 36 Mo. 573.

"It is said that this usage was not known to the plaintiff, and hence could not be obligatory upon it.

"A knowledge by plaintiff of this usage was not necessary to its validity." Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269, 276–277 (1872).

See Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858 (1907).

pose of protesting the bill himself, but as the agent of his partner, the other notary. He neither protested the bill, nor noted it for protest, at the time; and his drawing up of the protest, long afterwards, must be regarded as having no basis of contemporaneous fact or present authority, and as being entirely void. Byles, Bills, 201–203; Sto. Bills, § 283; Leftley v. Mills, 4 T. R. 174. * * *

Judgment affirmed.

SECTION 5.—NOTICE OF DISHONOR

SMITH v. MULLETT.

(Nisi Prius, 1809. 2 Camp. 208.)

Action against the indorser of a bill of exchange drawn by one Mills, payable to his own order, and indorsed by him to the defendant, by the defendant to one Hefford, by Hefford to one Aylett, by Aylett to the plaintiff, and by the plaintiff to one Lowe.

The bill became due on Saturday, May 19th, when it was in Lowe's hands. He and all the parties to it reside in the metropolis. On Monday, the 20th, Lowe gave notice to the plaintiff that the bill had been dishonored. On Tuesday afternoon, a few minutes past 5, the plaintiff's clerk put a letter into the two-penny post office, giving notice to Aylett. This letter having been put in so late, according to the course of the two-penny post, was not delivered out till Wednesday morning. On Wednesday Aylett gave notice to Hefford, and Hefford to the defendant. The question was, whether the defendant had received due notice of the dishonor of the bill.[42]

Lord ELLENBOROUGH. It is of great importance that there should be an established rule upon this subject, and I think there can be none more convenient than that where the parties reside in London, each party should have a day to give notice. I have before said, the holder of a bill of exchange is not, omissis omnibus aliis negotiis, to devote himself to giving notice of its dishonor. It is enough if this be done with reasonable expedition. If you limit a man to the fractional part of a day, it will come to a question how swiftly the notice can be conveyed. A man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on the Monday, and does not give notice to his indorser till the Wednesday. If a party has an entire day, he must send off his letter conveying the notice, within post time of that day. The plaintiff only wrote the letter to Aylett on the Tuesday. It might as well have

[42] The arguments of counsel are omitted.

continued in his writing desk on the Tuesday night, as he at the post office. He has clearly been guilty of laches, by which the defendant is discharged.

Plaintiff nonsuited.[43]

BURBRIDGE v. MANNERS.

(Nisi Prius, 1812. 3 Camp. 193.)

See post, p. 651, for a report of the case.

BRAY et al. v. HADWEN.

(Court of King's Bench, 1816. 5 Maule & S. 68.)

At the trial of this cause before Graham, B., at the last Devon assizes, the action being by the plaintiffs as indorsees against the defendant as indorser of a bill of exchange, the question was, if sufficient notice of the dishonor of the bill had been given to the defendant. The bill was payable at a banker's in London, and became due on the 14th of July, 1814, and was presented on that day about 12 o'clock, and dishonored. The bill was returned with notice of its dishonor by the post on the 15th to Glyn & Co., bankers at Launceston, with whom the plaintiffs had deposited the bill as their bankers. The letter reached Launceston on Sunday morning, the 17th. And on Monday, the 18th, Glyn & Co. sent notice by the post to the plaintiffs at Tavistock, where they resided, and the plaintiffs afterwards forwarded notice to another indorser, who gave notice to the defendant. The post from London to Launceston arrives at Launceston at 8 o'clock in the morning, and letters are delivered in about half an hour, and the post from Launceston to Tavistock leaves Launceston at 12 at noon, allowing an interval of about four hours. The letter which the bankers at Launceston put into the post on the Monday, to the plaintiffs at Tavistock, was not put in until after 12 o'clock, after the departure of the post, in consequence of which it did not go from Launceston till the next post, nor reach Tavistock before the morning of the 20th; whereas, if it had been sent to the post before 12 o'clock on the Monday it would have reached Tavistock on the morning of the 19th. And the question was whether the Launceston bankers should not have apprised the plaintiffs by the earliest possible post, that is, by sending the letter to the post on Monday before 12 o'clock, or whether they had the whole of Monday to do it. There was also another question, whether the plaintiffs should not have given notice immediately to the defendant, instead of giving it to another indorser, and through the medium of that

[43] Accord: Siegel v. Dubinsky, 56 Misc. Rep. 681, 107 N. Y. Supp. 678 (1907).

indorser to the defendant. The learned judge ruled in favor of the plaintiffs upon both points, and there was a verdict for the plaintiffs.

Lens, Serjt., moved for a new trial.[44]

Lord ELLENBOROUGH, C. J. It has been laid down, I believe, since the case of Darbyshire v. Parker, 6 East, 3, as a rule of practice, that each party, into whose hands a dishonored bill may pass, should be allowed one entire day for the purpose of giving notice. See Scott v. Lifford, 9 East, 347, and Langdale v. Trimmer, 15 East, 291. A different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it. This rule is, I believe, in conformity with what Marius states upon the subject of notice, and it has been uniformly acted upon at Guildhall, by this Court, for some time. It has, moreover, this advantage: That it excludes all discussion as to the particular occupations of the party on the day. As to the objection that notice was not given by the holders immediately to the defendant, it was given by one who was an indorser, and not by a stranger, which is enough to satisfy the allegation that the defendant had notice.

Rule refused.

HEWITT v. THOMSON.

(Court of Exchequer, 1836. 1 Moody & R. 543.)

Assumpsit against the drawer of a bill of exchange.

The bill was dated, "3 Wilton Street, 30 November, 1835," and purported to be drawn by "Chas. Thomson," and to have been accepted by one John Johnson, payable to the drawer's order, by him indorsed to I. R. Nicolls, who indorsed it to the plaintiff.

Plea, that the defendant had not notice of the dishonor, and issue thereon.

It appeared in evidence that when the bill was returned unpaid to the plaintiff as indorser, on the 7th March, 1836, his attorneys wrote a letter containing notice of the dishonor, and put the same into the twopenny post; but, misreading the drawer's surname for "Thornton," instead of "Thomson," they directed their letter "to C. Thornton, Esq., No. 3 Wilton Street." The defendant had ceased to reside at that place before the bill became due, and the letter was returned to the attorneys of the plaintiff on the 10th of March, from the Dead Letter Office, with an intimation that no such person as Mr. Thornton was known at No. 3 Wilton street, whereupon the attorneys on the same day, having made inquiries who the defendant was, and having ascertained his present residence, addressed a notice to him in his right name at that residence. The postman who had the delivery of letters

[44] The arguments of counsel are omitted.

in Wilton street on the 7th was called and said that, being informed there was no such person as Mr. Thornton living at No. 3, he returned the letter to the head office, without making any further inquiry. It was contended for the defendant that no notice of dishonor had been given to him until the 10th of March, which was clearly too late.

PARKE, B., told the jury, that it was clear the defendant had not received notice within the time limited by the ordinary rule, and that it was fit they should watch very closely any evidence adduced for the purpose of taking any particular case out of that rule. The notice ought to have been given on the 7th. In fact it did not reach the defendant until the 10th; and the question for the jury was whether sending the letter on the 7th to the residence occupied by the defendant when the bill was drawn by him, and with the error that had been proved to exist in the defendant's name upon the address of the letter, was a sufficient notice? They would look at the bill, and examine the defendant's signature thereto, and then say whether the mistake in the address was attributable to the want of proper care on the part of the plaintiff or his attorneys, or whether it might more reasonably be said to result from the defendant's own manner of writing his name in the bill. If they were of the latter opinion, their verdict would be for the plaintiff.

Verdict for the plaintiff.[45]

HARRISON v. RUSCOE.

(Court of Exchequer, 1846. 15 Mees. & W. 231.)

Assumpsit on a bill of exchange for £210. 10s., dated 21st December, 1822, drawn by the defendant on, and accepted by, Daniel Ruscoe, payable to the order of the defendant in London four months after date, indorsed by the defendant to W. H. Vaughan, and by him to the plaintiff. Plea, that the defendant had not due notice of the non-payment of the bill. Issue thereon.

At the trial, before the recorder of Chester, it appeared that, the bill having become due on the 24th of April, 1845, and being dishonored, the plaintiff's attorney, a Mr. Roberts of Chester, wrote and sent to the defendant, on the 26th, the following notice of dishonor:

"Sir: I am requested by Mr. W. H. Vaughan, of this city, to apply to you for the payment of the amount due on you and your brother Daniel Ruscoe's dishonored bill to him; and as Mr. Vaughan is very pressing for the amount, I trust you will immediately oblige me with the same, together with my charge as under.

"I am, sir, your obedient servant, S. J. Roberts."

[45] Accord: The Elmville, [1904] Prob. Div. 319, 329 (delay caused by ignorance of sea captain's address); Citizens' Bank v. Pugh, 19 La. Ann. 43, (1867), delay caused by war, semble. But notice must be given when cause of delay ceases to exist. Studdy v. Beesty, 60 L. T. (N. S.) 647 (1889.) See Feck v. Easton, 74 Conn. 456, 51 Atl. 134 (1902).

Mr. Roberts, being called as a witness for the plaintiff, stated that he had no authority from Vaughan to give any notice of dishonor, and that Vaughan's name was inserted in the letter by a clerk of his, in mistake, instead of the plaintiff's. The bill having fallen due in the hands of a banker in London, a notice of dishonor given on the 26th of April would be good either for the plaintiff or for Vaughan.

It was contended for the defendant, first, that under these circumstances the notice of dishonor, being given in the name of Vaughan, from whom Mr. Roberts had no authority to give it, was of no avail; and, secondly, that it was bad in form, as it improperly described the bill as being the bill of the defendant and his brother. The learned recorder thought the notice was good, and directed a verdict for the plaintiff for the amount of the bill and interest, giving the defendant leave to move to enter a nonsuit. The plaintiff obtained a rule nisi accordingly.[46]

PARKE, B. * * * The only question is whether this notice was sufficient; for we have already intimated our opinion that the notice was in sufficient time, whether it be considered as given by the plaintiff or Vaughan, and that it sufficiently referred to the bill in question, and notified its due presentment and nonpayment.

Since the case of Chapman v. Keane, 3 Ad. & E. 193, it must be considered as perfectly settled that a notice of dishonor need not be given by the holder, but that he may avail himself of notice, given in due time by any party to the bill. The decision in that case is referred to and adopted by Chancellor Kent, Commentaries, vol. 3, p. 108, and Mr. Justice Story on Bills of Exchange, § 304. The former states the rule to be that the notice may be given by any one who is a party to the bill; the latter states it more fully, and says that the notice will be sufficient, although not given by the holder or his agent, if it comes from some person who holds the bill when it is dishonored, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof.

The notice, by the terms of the rule as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill, that is, in due time, if he himself were suing; and, consequently, the case of notice by a party who had himself been already discharged by the laches of the holder, is excluded. So the terms of the rule as laid down by Mr. Justice Story seem to exclude the case of a party to the bill, who could not himself sue upon it on paying the amount of the bill; at least they must be so understood, otherwise the mischief would happen which was pointed out by Mr. Jervis, that there might be a bill with 20 indorsements, which the holder might retain 20 days after its dishonor, and then recover against the drawer on a notice then given to him by the first indorsee, which that indorsee himself could not do. Such a notice would not be in good time if given by the first indorsee,

[46] The arguments of counsel and part of the opinion are omitted.

and would therefore be bad, and not support an action by the last. The rule equally excludes the case of notice by an acceptor, who never could sue himself upon the bill after taking it up; and the instances in which a notice by an acceptor has been held good at nisi prius (Thorold v. Smith, 1 Chit. R. 227; Rosher v. Kieran, 4 Campb. 87) are explained by Mr. Justice Bayley (Bayley, Bills [Ed. 1830], c. 7, § 2, p. 254, et seq.) on the supposition that in these the acceptor had a special authority to do so.[47] But in the present case Vaughan, in whose name the notice was given, was not discharged by the laches of the holder at the time it was given, and a notice by him on the 26th would have been in sufficient time to support an action by him, and, consequently, an action by the plaintiff. There is therefore no objection to the notice on that ground; nor would there have been any, if the attorney had omitted to state on whose behalf he applied. It was so held in Woodthorpe v. Lawes, 2 M. & W. 109, and had been previously laid down in Chancellor Kent's Commentaries (volume 3, p. 108), who says that any agent in possession of the bill may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill.

It remains, therefore, to consider what is the effect of giving an untrue description of the party on whose behalf it was given. This point has never been decided; for in Chapman v. Keane, the only case which bears upon it, the plaintiff's clerk, who gave the notice, must have been authorized, by the nature of his employment, to give it on behalf of the plaintiff, as he was, by the express authority of the holder, to give it for him; and the notice stated no untruth. Here there is an untrue statement, but made unintentionally, and by a mere mistake.

There is, no doubt, a difference between the two cases, where a notice is given by an authorized person, without stating on whose behalf it is given, and where untrue information is afforded. In one case, the party is put on inquiry, if he thinks fit to make it; in the other, he is misinformed. What, then, ought to be the result of that misinformation? It is to be recollected that, whether the party is misled or not as to the person giving the notice, the great object of a notice is answered by the information of the dishonor of the bill, and the person to whom notice is given is thereby enabled to withdraw his effects from, or take his remedy against, the prior parties. And we think it reasonable to hold that the misrepresentation of the name of the person on whose behalf notice is given ought not wholly to avoid the notice, but only to place the party giving it in the same situation, as to the party to whom it was given, as if the representation had been true; and, therefore, the defendant ought to have every defense against the plaintiff that he would have had if the notice had been really given by the party named. And this is in analogy with the law as to con-

[47] See Trader's Nat. Bank v. Jones, 104 App. Div. 436, 93 N. Y. Supp. 768 (1905), where the maker as agent for the holder, notified his accommodation indorser.

tracts with factors acting for concealed principals, and similar cases, where the contract is not avoided by the misstatement, but the other party has all the equities against the real as he would have had against the apparent contractor. If, therefore, in the present instance, the notice by Vaughan would have been bad (as it would have been had he been discharged by laches, or had no right of action on the bill against the defendant if he had taken it up), the defendant would have had a defense; if good, as upon the evidence it appears that it would have been, the defendant has not been injured, and has no right to complain of the misrepresentation.

We think, therefore, the ruling of the learned recorder was right, and the rule ought to be discharged.

ROWE v. TIPPER.

(Court of Common Pleas, 1853. 13 C. B. 249.)

Assumpsit by indorsee against indorser of a bill of exchange.

The declaration stated that one Green, theretofore, to wit, on the 12th of July, 1851, made his bill of exchange in writing, and directed the same to Messrs. Knight & Co., and thereby required them to pay to his order the sum of £52. 9s., four months after the date thereof, for value received, which period had elapsed before the commencement of the suit; that Green indorsed the bill to the defendant; that the defendant indorsed it to one Abley; and that Abley indorsed it to the plaintiff, before it became due; and that Knight & Co. did not pay the said bill, although the same was duly presented to them for payment, on the day when it became due—of all which the defendant then had due notice, and then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill, on request.

By his sixth plea, the defendant traversed the notice of dishonor.

The cause was tried before Cresswell, J., at the second sitting in London, in Michaelmas term last. It appeared that the bill was duly presented when it became due, viz. on Saturday, the 15th of November, 1851, at the place where it was made payable, and was dishonored; that the plaintiff, on the 17th of November, gave notice of dishonor to Abley, and on the 18th (through the agency of one Delane) gave notice to the defendant.

On the part of the defendant, it was insisted that the notice to him was too late, and that there was no evidence that the notice given by Delane was given with the authority of the plaintiff; all that was proved being that the bill had been placed in Delane's hands to obtain payment.

For the plaintiff, it was insisted that, inasmuch as the notice reached the defendant in the same time as it would have done if Abley had given it, it was a sufficient notice, and that Delane was duly authorized to give

the notice; and the case of Turner v. Leech, 4 B. & Ald. 451, was referred to.

The learned judge directed the jury to find for the defendant on the sixth issue, reserving leave to the plaintiff to enter the verdict for him, for the amount of principal and interest, if the court should be of opinion that the notice was sufficient. The plaintiff obtained a rule nisi accordingly." [48]

JERVIS, C. J. It seems to me that the rule laid down in Chitty and Hulme is the correct rule, and that, if the holder of a bill of exchange wishes to avail himself of a notice of dishonor given by him to a remote indorser, he must give it within the time within which he is by law required to give it to his immediate indorser; and he cannot avail himself of his laches, to gain another day. If he could, the consequence which has been pointed out would follow, viz. that, if there were 20 indorsers, he would have 20 days within which to give notice to the first of them. The rule is correctly laid down by Burrough, J., in Dobree v. Eastwood, 3 C. & P. 250, that the holder has his day to give notice to any party he may seek to charge, and that each of the prior indorsers in turn has his day. Each has one day to give notice to all the parties against whom he intends to enforce his remedy. That is the result of all the decisions. No doubt it is settled that the holder need not himself have given all the notices; he may avail himself of a notice duly given by any other party to the bill. That was decided in Chapman v. Keane, 3 Ad. & E. 193, 4 N. & M. 607. And in Harrison v. Ruscoe, 15 M. & W. 231, Parke, B., commenting upon that case, says: "The notice, by the terms of the rule, as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill, that is, in due time if he himself were suing." That, in fact, is recognizing the rule as stated in Chitty and Hulme. The notice upon which the plaintiff relies in this case is his own notice; and he must show that that was given in due time. He gave notice in due time to Abley, his immediate indorser; but he did not give due notice to the defendant. I am, therefore, of opinion that he has by his laches released the defendant; and consequently the rule which has been obtained to enter the verdict for the plaintiff on the sixth issue, must be discharged.

LINN v. HORTON.

(Supreme Court of Wisconsin, 1863. 17 Wis. 151.)

Yates and Gray, for value, gave their note, indorsed for them by Horton before delivery, and payable to the plaintiffs or order at the Rock County Bank, at Janesville, in this state. Before the note became due, the plaintiffs, who were merchants in the city of New York, indorsed it for collection to Kissam & Taylor, bankers in the same city,

[48] The arguments of counsel and the opinion of Maule, J., are omitted.

who indorsed it and sent it for collection to the Central Bank of Wisconsin, at Janesville. Default having been made in its payment when due, to wit, November 22, 1861, it was duly protested, and on the same day the note and notice of protest for Horton, and like notices for Kissam & Taylor and the plaintiffs respectively, were inclosed in an envelope and deposited in the post office at Janesville, post paid, directed to Kissam & Taylor, who received the same November 27th. On the same day Kissam & Taylor delivered to the plaintiffs the notices addressed to them and to Horton respectively; and the plaintiffs, on the same day, inclosed the notice for Horton in an envelope directed to him at Janesville, and deposited the same post paid, in the post office at New York; but the notice was never, in fact, received by Horton. This action was brought against Horton together with the makers; but the circuit court found that "the notary, who protested the note, did not use due diligence to ascertain the residence of Horton," and thereupon held that proper steps had not been taken to charge him, and rendered judgment in his favor; from which the plaintiffs appealed.[49]

DIXON, C. J. It is an established principle of mercantile law that, if the holder of a bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given, in due time, by the other parties, it will inure to the benefit of the holder, and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. 1 Parsons on Bills and Notes, 503, 504; and Edwards on Bills and Notes, 473, 474, and the cases cited. And it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he receives it. Colt v. Noble, 5 Mass. 167; Mead v. Engs, 5 Cow. (N. Y.) 303; Howard v. Ives, 1 Hill (N. Y.) 263. And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. Howard v. Ives, and the authorities cited.

For the purpose of receiving and transmitting notices, those who hold at the time of protest, and those who indorse as mere agents to collect, are regarded as real parties to the bill or note; the former as holders in fact, and the latter as actual indorsers for value. Mead v. Engs; Howard v. Ives.

It follows, from these principles, that the proper steps were taken to charge the defendant Horton as indorser. Notice for him was forwarded by mail, post paid, on the day of the protest, to the agents and last indorsers in New York, and delivered by them, on the day it was

[49] The arguments of counsel and part of the opinion are omitted.

received, to the plaintiffs, their immediate indorsers, who, on the same day, deposited it, inclosed in an envelope, post paid, in the post office at New York, directed to the defendant at Janesville, Wis., his proper post office.

Under these circumstances the only question which can possibly arise is whether the defendant ought to be discharged by reason of the notice not having been in fact received by him. He testifies that it was not. Professor Parsons observes that in all the cases of constructive notices, where notice given by a subsequent to a prior indorser has been held to inure to the benefit of the immediate indorser, it has appeared that the notice was actually received; and he raises a question whether this would be so if the notice was sent to the wrong place. 1 Pars. on Notes and Bills, 504, note, and 627. But here the notice was sent to the right place. Besides, the plaintiffs, who seek to avail themselves of the notice, are the indorsers who sent it to the defendant as the indorser next immediately preceding them. We have already seen that the rule of diligence as to them is the same as in the case of the holder. * * *

Judgment reversed.

REQUA v. COLLINS.

(Court of Appeals of New York, 1872. 51 N. Y. 144.)

Appeal from judgment of the General Term of the Supreme Court in the Eighth Judicial District, affirming a judgment in favor of plaintiff, entered upon the decision of the court upon trial at circuit without a jury.

This action was upon a promissory note dated June 2, 1864, payable one year after date, made by one Miller for the accommodation of one Brown, and indorsed by the latter and by the defendant, payable at the Flour City Bank, Rochester. The answer denied notice of protest; and the only question litigated at the trial was whether notice had been properly served so as to charge defendant.

The material facts were as follows: Brown delivered the note to W. R. Townsend to sell for him, and he sold it to the plaintiff, who resided at Kendall, Orleans county, about 25 miles from Rochester. The plaintiff held it until it was about due, and then he sent it by one Jewett to the Flour City Bank, at Rochester, for the purpose of having it protested if not paid. It was not paid and was protested, and notice of protest was mailed to the defendant, addressed to her at Rochester. She had, about six months before, moved from Rochester to the city of New York, and then resided there, having, before her removal, resided ten years in the city of Rochester. Before the note was sent to the bank, said Townsend, acting for the plaintiff, made inquiry as to the place of residence of the defendant of various persons, among whom was one Plumley, a relation of the defendant, residing in the

same town with the plaintiff. These inquiries were made at different times within six months before the note fell due, and he was informed that she resided at Rochester. Jewett, who took the note to the bank for the plaintiff for the purpose of having it protested, had been informed by various persons that defendant lived in Rochester. He was so informed by said Townsend in the winter or spring before the note fell due. He was also so informed by said Plumley in the fall of 1864. When Jewett left the note at the bank he told the teller that all the parties resided in Rochester, and the teller so informed the cashier, who was the notary who protested the note. No inquiry was made at Rochester on the day the note fell due as to the residence of defendant.

The court held that due diligence had been used to charge the defendant, and that she was liable upon the note.[50]

EARL, C. The defendant, at the date of the indorsement, had for ten years resided in Rochester, and she continued to reside there for six months thereafter, when she moved to the city of New York, where, during the last six months the note had to run, she resided. Neither the plaintiff nor his agents knew of this change of residence. They believed, in good faith, from information which they had received, that she continued to reside in Rochester. There is evidence tending to show that their inquiries as to her residence were made in the fall, winter and spring before the note fell due. They were made of persons likely to know defendant's residence. The information received was, therefore, such as the plaintiff could rely on, and, in pursuance of this information, the notary was directed to serve notice of protest upon the defendant at Rochester. She claims that she did not receive the notice, and hence that she was not charged as indorser.

In order to charge an indorser, it is not necessary that he should actually receive notice of protest. It is sufficient that such notice has been properly served. If the service be by mail, and the indorser has not indicated where notice may be served upon him by writing the place under his signature on the back of the note, the notice must be addressed to him at his place of residence. But in case the holder does not actually know the indorser's place of residence, the notice may be addressed to the place where, after diligent inquiry, he is informed and believes he resides. What is due diligence in such a case, the facts being undisputed or ascertained, is a question of law.

In Bank of Utica v. Phillips, 3 Wend. 408, the defendant was the second indorser upon a promissory note, payable in 90 days from date. At the time of the indorsement, he resided at Geddes, in the county of Onondaga, but in a few days thereafter removed to Fulton, Oswego county, where he continued to reside. At the time the note was discounted, it was known to the officers of the bank that the defendant resided at Geddes; but thereafter they made no inquiry as to his place

[50] The arguments of counsel are omitted.

of residence, and they received no information of its change. It was held that a notice of protest sent to Geddes was sufficient to charge the indorser. Judge Marcy, writing the opinion of the court, says: "It appears to me that the question of diligence cannot arise, except in cases where the party knows or ought to know that there is occasion for its exercise. Ought the holders of this note when it fell due to have known that, intermediate its discount and maturity, the indorser had changed his residence? They had no reason to expect such an event, and of course no considerations of diligence could have prompted them to institute any inquiry in relation to it." I think it would not be unreasonable to hold that in all cases, no matter how long the paper has to run, a notice of protest, addressed to the indorser at the place where he resided when he made the indorsement, should be sufficient to charge him, although he may have changed his residence. The holder should be permitted to act in good faith upon the presumption of his continued residence, unless he has received information of his change of residence. Such a rule will not be unfair or unjust to the indorser, as he can either notify the holder of the change of residence or make arrangements to have the notice forwarded to his new place of residence. But Judge Marcy, in his opinion, seems to limit the rule to paper having the usual time of bankable paper to run.

Here the evidence tends to show that the plaintiff, through his agents, was informed by several persons, at several times within six months before the note fell due, that the defendant resided at Rochester. He lived 24 miles from Rochester, and had no reason whatever to doubt that his information was true, and that she continued to reside there. No man of ordinary prudence would, under the circumstances, have acted upon the theory that she might have changed her residence. He used all the diligence the circumstances required of a prudent man, and he and his agents were not bound to make inquiries of her place of residence on the day the note fell due.

In Bank of Utica v. Davidson, 5 Wend. 588, a note was presented for discount by the agent of the maker, who informed the clerk of the bank that the indorsers resided in Bainbridge, and the clerk made a memorandum of this fact. When the note became due it was protested, and a notice of protest was directed to the defendant, one of the indorsers, at Bainbridge, no further inquiries as to his residence having been made. It turned out that the defendant had, a short time before he indorsed the note, removed from Bainbridge, a distance of 12 or 14 miles, to Masonville, in another county. The notice was held sufficient to charge the defendant, upon the ground that due diligence had been used. In Bank of Utica v. Bender, 21 Wend. 643, 34 Am. Dec. 281, the drawer took to the bank a bill of exchange, indorsed by the defendant, which was dated at Chittenango, and there wrote under the name of the defendant "Chittenango," to indicate his place of residence. This memorandum by the drawer, of course, had no greater

effect than if he had at the time given the bank parol information that the indorser resided at Chittenango. He in fact resided at Manlius, and had resided there for 20 years. The bill was protested for nonpayment, and notice of protest mailed to Chittenango, without any further inquiry as to the indorser's residence. It was held that the notice was sufficient, and that the defendant was charged. In Ward v. Perrin, 54 Barb. 89, the action was against the indorser of a note payable four months from date. At the time when the indorsement was made, and for about two months thereafter, the indorser resided in Rochester. About two months before the note fell due he removed from Rochester to Bergen. The note was protested, and notice of protest was mailed to the defendant at Rochester. The court held that the holders of the note were not bound to make any further inquiries, and that they could act upon the information as to the indorser's residence which they received when they discounted the note; that they had the right, when the note matured, to assume that the indorser continued to reside in Rochester, and to act accordingly in taking the requisite steps to charge him, unless they knew that in the meantime he had changed his residence.

These authorities are sufficient to show that the plaintiff, upon the facts in this case, used due diligence as to the residence of the defendant, and that she was properly charged.

Service by mail was authorized in this case by section 3 of chapter 416 of the Laws of 1857, and Rochester was, within the meaning of that act, the city where, "from the best information obtained by diligent inquiry," the defendant was reported to reside. The degree of diligence required under this section is not greater or other than that required by the common law as expounded in the authorities above cited, in cases where the place of payment differs from the place of residence of the indorser.

I therefore conclude that the judgment should be affirmed with costs.[51]

[51] Sufficient diligence not appearing, in the following cases, where notice was mailed addressed to the wrong place, the indorsers were not charged: Philip & William Ebling Brewing Co. v. Reinheimer, 32 Misc. Rep. 594, 66 N. Y. Supp. 458 (1900); Fonseca v. Hartman (Sup.) 84 N. Y. Supp. 131 (1903); Albany Trust Co. v. Frothingham, 50 Misc. Rep. 598, 99 N. Y. Supp. 343 (1906). Sufficient diligence appearing, the indorser was charged in Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606 (1899).

A fortiori, a notice mailed addressed to the proper place is sufficient, though not received. State Bank v. Soloman (Sup.) 84 N. Y. Supp. 976 (1903). Compare Studdy v. Beesty, 60 L. T. N. S. 647 (1889).

DICKEN v. HALL.

(Supreme Court of Pennsylvania, 1878. 87 Pa. 379.)

Assumpsit by J. G. Hall, as indorser, against J. C. Dicken, a prior indorser, on the following promissory note:

"$525.05. Pittsburgh, October 12th, 1876.

"Four months after date we promise to pay to the order of J. Charles Dicken, five hundred and twenty-five, and five one-hundredths dollars, at Workingman's Bank, Allegheny City, Pa., without defalcation for value received. Reed Bros., Agents."

Indorsed:

"Pay to the order of J. G. Hall. J. Chas. Dicken."

"Pay to the order of C. R. Kline, Cash. Jno. G. Hall."

"Pay to the order of Jas. A. Hill, Cash. C. R. Kline, Cashier."

"Pay to the order of F. L. Walther, Cash., for collection for account of Union Banking Co. of Philadelphia. Jas. A. Hill, Cashier."

At the trial the jury found the following facts, subject to the opinion of the court whether, upon these facts, the defendant had had due legal notice of protest and nonpayment: The note fell due and was duly protested on the 15th of February, 1877, in Allegheny City. The notices of protest were duly forwarded to the Union Banking Company of Philadelphia, the last indorser, and by that bank duly forwarded to the Elk County Bank, the next prior indorser, at Ridgway, Pa., at which place they arrived on 19th of February. J. G. Hall, the next prior indorser, lived in Ridgway, was an attorney, had a law office and a law partner there, and was also a member of the Elk County Bank, a private banking company. On February 20th Kline, the cashier of the bank, mailed the notices of protest to J. G. Hall, at Louisville, Kentucky, where he was temporarily. He did not go to his residence or place of business to give notice or make inquiry; but, knowing of the absence of Hall and where he was, and Hall having no one in Ridgway expressly authorized to attend to his private business, he mailed the notices to him at Louisville. Hall received the notices on the 22d day of February, and on the same day mailed the notices to Pittsburgh to defendant, who was the next prior indorser. If these facts constituted due and legal notice to defendant, judgment was to be entered on the verdict (which was for plaintiff for $567.11); otherwise judgment for the defendant non obstante veredicto.

The court in banc entered judgment on the reserved question for the plaintiff; White, J., delivering the following opinion:

"If the bank in Ridgway had left the notice of protest at Hall's residence in Ridgway or his place of business, no doubt the service would have been good. And if some one at Ridgway had received the notice for Hall and mailed the notice to Dicken, Dicken might have received the notice one or two days earlier than he did. The bank received notice on the 19th and had the 20th to give notice to Hall. Hall then

had until the 21st to mail notice to Dicken. Hall received notice at Louisville on the 22d, and the same day mailed the notice to Dicken.

"The principle of law is that notice of dishonor must be given in a reasonable time. What is reasonable time depends upon circumstances. But the general rule is that it must be given the next day where the parties live at the same place, or by the next practicable mail where they live at different post offices. Where there are several indorsers living widely apart, or where the mails are infrequent, several days, even weeks, may intervene between the day of dishonor and the time when some indorsers may receive notice.

"Although the residence or place of business is the usual and proper place for giving notice, it will be good if actually given anywhere; and if the indorser requests it, it may be sent to him at any place he may designate, and no doubt, when sent according to his directions, it would bind him, although he might never receive it.

"In this case, however, Hall gave no instructions to the bank. But the bank knew he was absent from home, and knew his post office address, and sent the notice to him by mail. He received it only one day later than he would have been entitled to receive it had he been at home, and no doubt actually received it sooner than he would have done, had it been left at his residence or usual place of business. He had no person expressly authorized to attend to his private business in his absence, and if the notice had been left at his residence or place of business it would probably have been neglected, or he would not have received it in time to give notice to his prior indorser. Hall therefore had no good ground of complaint against the bank. It was rather a favor to him that the notice was sent to him at Louisville. Otherwise he might have lost his claim upon the prior indorser.

"Has Mr. Dicken any good ground of complaint? He says, if the notice to Hall had been left at his residence in Ridgway, he (Dicken) would have received, or at least been entitled to receive, it one or two days earlier. There might be something in this if the delay had been to his injury or prejudice. But there is no allegation of that kind. Perhaps if the notice had been left at Hall's residence in Ridgway it would have been neglected until too late to notify Dicken, and in that way he might have escaped entirely. But such a contingency hardly constitutes a good ground of defense, at least in foro conscientiæ.

"In Byles on Bills, 272, it is said: 'If a party whose name is on a bill direct notice to be sent to him when absent at a distance from his residence, so that its transmission thither and thence to the prior parties will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant places will, it seems, not only be a good notice as against him, but also a good notice as against prior parties.' The same doctrine is laid down in 1 Parsons on Notes and Bills, 493, and Mr. Parsons goes farther, and suggests it may be the duty of the holder to send the notice to the party if he is absent from home and he knows his address.

"The right of an indorser to direct notice to be sent to him when absent from home is reasonable and proper, and is sustained by authority. When thus sent to him without previous direction, and he actually receives it, and receives it as soon or sooner than if left at his place of business, and he is not in any way prejudiced thereby, we think it is a good notice, and binds him. And we think it is good also as to the prior indorser who is not injured or prejudiced by the delay.

"We, therefore, direct judgment to be entered for the plaintiff on the reserved question."

The defendant assigned this entry of judgment for error.[52]

The judgment of the Supreme Court was entered October 21, 1878.

PER CURIAM. This judgment is affirmed, upon the opinion of the learned judge below on the reserved question.[53]

AMERICAN EXCH. NAT. BANK v. AMERICAN HOTEL VICTORIA CO. et al.

(Supreme Court of New York, Appellate Division, 1905. 103 App. Div. 372, 92 N. Y. Supp. 1006.)

LAUGHLIN, J. The action is against Charles M. Reed, the maker, and the appellant, as the indorser, of a promissory note payable to the order of Costikan Freres. The complaint alleges that the appellant

[52] The arguments of counsel are omitted.

[53] "But it is contended, if the notice was left at the Tremont House, as stated by the notary, it cannot avail the plaintiff, because it is admitted that the defendant's place of dwelling was in Bangor, and the text-writers upon bills of exchange and promissory notes are quoted as laying down the law that, if the person entitled to notice does not reside in or near the same town or city, the notice may be sent by mail to the post office, addressed to him in the place of his dwelling; and it is argued that, unless the holder or his agent can be proved to have delivered the notice into the hands of the indorser, the sending it to him by mail or by some special messenger at his residence will be indispensable. We think, however, that the rule is not so confined in its operation; and we coincide with the court, in Bank of U. S. v. Corcoran, 2 Pet. 121, 7 L. Ed. 368, that, 'if notice of the nonpayment of a note, though left at an improper place, was, nevertheless in point of fact received in due time by the indorser, and so proved, or could from the evidence in the cause be properly presumed by the jury, it is sufficient in point of law to charge the indorser.'" Bradley v. Davis, 26 Me. 45, 51, 52 (1846).

"The legal presumption is that, where there is a regular daily mail, it affords an early conveyance and a safe one, and a party is not bound to use one more expeditious or certain, but he may do so, and surely it would be no cause of exception to the regularity of the notice that it was received in advance of the mail. Neither is it necessary, however it may be prudent, that the notice, if sent by the mail, be inclosed to the address of the person to be charged. If a party be willing to hazard the receipt of notice by his correspondent, and the due attention of the correspondent to the service of the notice, he must abide the result. But if the party to be charged receive the notice in due time, he cannot object to the means which the owner or holder of the bill has employed." Whiteford v. Burck-Myer, 1 Gill (Md.) 127, 150, 39 Am. Dec. 640 (1843).

Accord: Jurgens v. Wichman, 124 App. Div. 531, 108 N. Y. Supp. 881 (1908). Compare Fielding v. Corry [1897] 1 Q. B. 268 (C. A.).

duly indorsed the note prior to maturity, having received full value therefor, and delivered the same to the payee for full value; that the payee subsequently and before maturity, for full value, duly indorsed and delivered the note to the plaintiff; that the note was duly presented for payment at the First National Bank of Erie, Pa., where it was made payable, and payment thereof duly demanded and refused, whereupon it was duly protested for nonpayment, and that notice thereof was forthwith duly given to all of the indorsers. The answer of the appellant put in issue, among other things, the allegations of the complaint concerning notice to it of the presentation of the note for payment, the demand and refusal of payment, and of the protest. The plaintiff proved the making and indorsement of the note, the delivery to it, and offered the note in evidence with the notary's certificate showing that he protested it for nonpayment on the 14th day of October, 1901, the day it fell due.

For the purpose of proving the service of the notice of protest on the appellant, the plaintiff called one Mairs, who testified that on the 16th day of October, 1901, he served an original notice of protest made by the notary at Erie, Pa., on the 14th, and addressed: "To American Hotel Victoria Co. S. B. A. Price, Prest."—upon the appellant at the Victoria Hotel, Broadway and Twenty-Seventh street, by leaving it "at the cashier's window." He does not show that the cashier or any one else was present or that he drew the attention of any one thereto, or that he made any effort to find any officer of the defendant, or any one in charge of the hotel, to whom to deliver it. The defendant called Mr. Sweeney, who testified that he was elected president of the defendant and purchased its capital stock on the 2d of January, 1901, and continued to be president down to the time of the trial; that he had charge of the management of the business of the appellant and of the hotel during the same period, and on the 16th day of October, 1901; that he did not see or receive any notice of the protest or dishonor of the note, and the first he knew of the existence of the note, or heard of it, was when he received a letter from attorneys stating that they had the note for collection; and that, unless it was paid within a certain time, action would be brought thereon. At the close of the evidence, counsel for the appellant moved to dismiss the complaint upon the ground, among others, that the plaintiff had failed to prove notice to it of the dishonor of the note. The motion was denied, and an exception taken.

We are of opinion that the judgment must be reversed. The appellant is sued solely as indorser of this note. The evidence is wholly insufficient to show the service of the notice of protest upon it. Negotiable Instruments Law (Laws 1897, p. 704, c. 612) §§ 160, 167, 168, provide that notice of dishonor, to charge an indorser, may be given by delivering it personally or through the mail either to the party himself, or "to his agent in that behalf." This doubtless was not intended to change the rule as it theretofore existed. Eaton & Gilbert on Com.

Paper, 489. Where personal service is relied upon, the evidence must show either actual personal service, or an ordinarily intelligent, diligent effort to make personal service, upon the indorser, either at his place of business during business hours, or at his residence if he have no place of business; but, if he be absent, it is not necessary to call a second time, and the notice may in that event be left with any one found in charge, or, if there be no one in charge, or no one there, then the giving of notice is deemed to be waived. Stewart v. Eden, 2 Caines, 121, 2 Am. Dec. 222; Bank of Commonwealth v. Mudgett, 45 Barb. 663; Id., 44 N. Y. 514; New York & Alabama Contracting Co. v. Selma Savings Bank, 51 Ala. 305, 306, 23 Am. Rep. 552; Allen v. Edmondson, 2 Exch. Rep. 719; Williams v. Bank of U. S., 2 Pet. 96, 7 L. Ed. 360; Huffcut's Negotiable Instruments, p. 47. The evidence in this case shows that personal service was not made upon any officer of the corporation, and there is no evidence that the notice was left with any agent of the corporation, or even where it might be reasonably inferred that an officer or agent of the corporation would receive it. It does not even appear upon what floor or in what part of the hotel the cashier's window was, at which the notice was left. There can be no inference from such evidence that the notice was received by the corporation; and the president and manager of the hotel, who was in charge, testifies that it was not brought to his attention.

Judgment reversed.

PINKHAM v. MACY.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1845. 9 Metc. 174.)

Assumpsit on the following note, held by the plaintiff, as executrix of the last will of Seth Pinkham, to whom it was indorsed by the payee:

"Nantucket, April 1, 1837.

'At the termination of the ship Obed Mitchell's present voyage, for value received, I promise to pay to the order of Josiah Macy eight hundred and fourteen dollars and forty one cents, with interest till paid

"James Mitchell."

At the trial in the court of common pleas, at Nantucket, before Ward, J., the signatures of the maker and indorser were admitted; and the plaintiff, to prove demand on the maker, and notice to the defendant as indorser, called J. M. Bunker, a notary public, who testified that the defendant had always resided in Nantucket; that Mitchell, the maker, resided there at the date of the note, but that he removed his business and family to the city of New York before the arrival of the ship Obed Mitchell; that said ship arrived at the bar of Nantucket, on Sunday 27, 1841; that the witness, on the next day, took said note, as notary public, and went to the place of business formerly

occupied by the maker, in Nantucket, and found it closed; that he then went to the house formerly occupied by the maker, in Nantucket, and found another family residing there, but then presented the note and demanded payment thereof, which was refused; and that he thereupon made and gave to the defendant this notice:

"Nantucket, June 28, 1841.

"Please to take notice that a promissory note for $814.41, with interest, dated October 1, 1837, payable at the termination of ship Obed Mitchell's voyage, now completed, signed by James Mitchell, and indorsed by you, remains this day unpaid, and that the holders look to you for payment thereof. Done at the request of Seth Pinkham.

"James M. Bunker, Notary Public. [Seal.]

"To Josiah Macy."

The judge ruled that said notice was not sufficient to charge the indorser; and the jury found a verdict for the defendant. The plaintiff alleged exceptions to said ruling.

SHAW, C. J. The question is whether due notice was given to charge the indorser. This subject was so fully discussed in the recent case of Gilbert v. Dennis, 3 Metc. 495, 38 Am. Dec. 329, that it seems only necessary to inquire whether this case falls within the principles laid down in that case. The rule there laid down was that the notice must be such as to inform the indorser, either in terms or by reasonable implication, that the note was dishonored; that is, that it had been presented for payment, and payment refused, or other act done, which by law is deemed equivalent. It is not necessary to state what has been done; whether an actual demand was made, or that the note lies over at a bank where, by contract or by usage, it was payable, or that the maker has absconded. All this is matter of proof afterwards, to show the fact of dishonor. But the notice must be such as to assert or imply that the note has been presented and payment refused, or otherwise dishonored. It was also stated that a notice simply that the note is unpaid is sufficient, where, from the terms of the note, nonpayment and lapse of time constitute such dishonor. So, when a note is payable at a bank, it is the duty of the maker to pay it at the bank, on the last day of grace. Then a notice dated after bank hours, on that day or the next day, simply informing the indorser, who is presumed to know the terms and purport of the note, that it is, at that time, unpaid, is notice of dishonor. But in case of a note not payable at a place certain, where presentment or inquiry is necessary, in order to make a demand, such a notice, either on or after the day of payment, is not, in terms, or by intendment or implication, notice that it has been demanded, or that it is dishonored.

In the present case, all that was stated in the notice might be strictly true, though no presentment and demand had been made, and though the maker had not left the island, and no inquiry for him had been made. It is, therefore, exactly within the case of Gilbert v. Dennis. It was suggested, in the argument, that there is a difference, because,

in the present case, the notice was given by a notary public. But this can make no difference in principle; and we think it would not be expedient for the community that a rule of law so universally important should depend on new or slight distinctions. A notary public, in such case, is the mere agent of the holder. His service is not required, as in case of a foreign bill of exchange, to make a protest. City Bank v. Cutter, 3 Pick. 414.

A case may happen, where a reference to a protest by a notary public, which term implies a demand and refusal, may be important, because it intimates, by implication, that the note has been dishonored: As where the notice of nonpayment is accompanied with notice that the holder looks to the indorser for payment, with costs, or fees, or charges of protest. This may be sufficient to show, by reasonable intendment, that it has been protested for nonpayment, which is notice of dishonor. But the present notice carries no such implication, but is a simple notice of nonpayment, without intimation of dishonor.

There seems to be another good ground of defense, namely, that the demand and notice were too soon. If the arrival of the ship at Nantucket was not the termination of the voyage, then they were too soon. If it was such termination, then it became a day certain, and the note was entitled to grace.

Exceptions overruled.[54]

MARSHALL v. SONNEMAN.

(Supreme Court of Pennsylvania, 1906. 216 Pa. 65, 64 Atl. 874.)

Assumpsit on a promissory note. Judgment for plaintiff. Defendant appealed.

MESTREZAT, J.[55] This is an action by an indorsee against an indorser to recover the balance due on a promissory note. One of the defenses interposed at the trial was an alleged failure to give the defendant notice of the dishonor of the note. The plaintiff proved the execution of the note by the maker, and introduced testimony to show that the defendant had indorsed it. A notary public was then called and he testified that he had protested the note at maturity for nonpayment, and that on the same day he had delivered notices of protest personally to both the plaintiff and the defendant, who were the indorsers. He said he gave but one notice to the defendant. The certificate of protest was offered in evidence by which it appears that the note was protested on the day it became due, and that the notary had notified the indorsers "by notices of protest personally delivered to" the plain-

[54] Contra: Reed v. Spear, 107 App. Div. 144, 148, 94 N. Y. Supp. 1007 (1905). See Second Bank v. Smith, 118 Wis. 18, 27, 94 N. W. 664 (1903).

[55] The statement of the case and the arguments of counsel are omitted.

tiff and defendant. A copy of the notice was not produced at the trial by the plaintiff.

The defendant denied that he had received notice of the dishonor of the note. He testified that the notary delivered to him an envelope addressed to L. A. Marshall, the plaintiff, which contained the following notice:

"Notice of Protest.

"York, Pa., March 1, 1904.

"L. A. Marshall: Please take notice that the note of M. Fink for four thousand dollars in favor of A. Sonaman dated York, Pa. Nov. 2, 1903, payable March 1, at L. A. Marshall & Co., Bankers, York, Penna. and by you endorsed, (being due this day, payment having been demanded and refused,) is protested for nonpayment, and that the holders look to you for the payment thereof.

"Respectfully yours, Henry K. Kraber, Notary Public."

The defendant further testified that the notary gave him no other notice, paper, or envelope. He then offered in evidence the notice which, on objection by the plaintiff, the trial judge excluded, stating the reason for his ruling as follows: "I think there is sufficient notice there to hold him under the law. If this was addressed through the post office, it would not be evidence because he would not have received it; but it was delivered to him at his place of business and he could not help but have notice. We do not think it shows want of notice, but, on the other hand, it shows sufficient notice, although it was improperly addressed." This is the subject of the second assignment of error.

The correctness of the ruling of the learned court depends upon the sufficiency of this notice. If it was sufficient notice to the defendant of the dishonor of the note, he was not injured by the exclusion of the offer. He admits he received the notice from the notary on the day the note was protested. If, however, the notice was insufficient to charge the defendant with liability on the note, it was error to exclude the offer. In that view it became a question for the jury to determine under the evidence whether legal notice of dishonor had been given, and, as bearing on that question, it is apparent that this notice was competent evidence. The notary testified that he delivered only one notice to the defendant, but he denied that the notice excluded was the one he gave the defendant. The defendant testified that he received but one notice from the plaintiff, and that the paper in question was that notice. It is true that the certificate of protest showed that a notice had been delivered to the defendant, but that was only prima facie evidence of the fact, and the party could contradict it by other evidence. It was therefore a question of fact for the jury what, if any, notice of protest was given the defendant; and, if they had found that the only notice given him was the paper produced by him on the trial, it would

have been the duty of the court to determine the legal effect of the paper, and, if that had been against its sufficiency as a notice, the verdict should have been for the defendant. The controlling question in the case, therefore, was the sufficiency of the notice.

If the holder of negotiable paper desires to charge antecedent parties with its payment, it is incumbent on him to give them notice of its dishonor. He may notify either or all of the prior indorsers, but he can compel payment only from those who have received notice of the maker's default. The notice may be either written or verbal, or it may be partly written and partly verbal. "All that is necessary," says the learned author of Byles on Bills, *276, "is to apprise the party liable of the dishonor of the bill in question, and to intimate that he is expected to pay it. And an announcement of the dishonor will (at least if it come from the holder) amount to a sufficient intimation to the indorser that he is liable." It is sufficient if under all the circumstances the language of the notice imports that the indorser is looked to for payment, and it would seem not unfair to imply such intention from the very fact of sending notice of dishonor. 7 Cyc. 1109. The weight of authority is that a notice of dishonor is sufficient to charge an indorser, if it comes from the holder or his agent and notifies the indorser that the note was presented and payment was refused. Notice of nonpayment, however, is not sufficient; nor is mere knowledge of protest all that is required to charge the indorser. Says the author above quoted (page 276): "Notice does not mean mere knowledge, but an actual notification. For a man who can be clearly shown to have known beforehand that the bill would be dishonored is, nevertheless, entitled to notice."

In Tindal v. Brown, 1 Term Rep. 167, Ashhurst, J., says: "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker. The party ought to know whether the holder intends to give credit to the maker or to resort to him." And in the same case Buller, J., observes: "The notice ought to purport that the holder looks to the party for payment, and a notice from another party cannot be sufficient. It must come from the holder." This case and many other English authorities are cited on the subject in the opinion of this court in Juniata Bank v. Hale, 16 Serg. & R. 157, 160, 16 Am. Dec. 558, where it is said: "That knowledge of nonpayment is not notice is very clear for the notice must come from the holder himself, or some one who is a party; for the notice must assert that the holder intends to stand on his legal right, and to resort to the indorser for payment, and therefore, where the drawer had notice before the bill was due that the acceptor had failed, and gave another person money to pay the bill and the holder neglected to give notice of its dishonor, it was held that the drawer was discharged."

We are of opinion that the written notice which the defendant alleges was delivered to him was not sufficient to charge him with the dishonor of the note. It was in proper form, signed by a notary, and was delivered in due time. But on its face it clearly discloses the fact that it was not intended for the defendant. It was directed to L. A. Marshall, the plaintiff, and the envelope containing it bore the same address. Marshall, like the defendant, was also an indorser of the note, and, if the holder intended to impose liability on him, it was necessary that he should have notice of dishonor. It is therefore apparent that this notice was intended for Marshall, and was, of course, for the purpose of apprising him of the dishonor of the note, and was prepared by the notary with that intention. The notary does not testify that at the time he delivered the envelope containing the notice he told the defendant what it contained or said anything to him concerning its contents. He did not apprise the defendant that the note had been dishonored or that the notice was intended for him. He gave the defendant no verbal notice whatever, and hence all the information the latter had of the dishonor of the note and the intention of the holder to guard his rights and to avoid responsibility by fixing liability on antecedent parties was what was contained in the envelope addressed to Marshall. This, as we have observed, was a notice to Marshall that the note "by you indorsed" was protested for nonpayment, "and that the holders look to you for the payment thereof."

Why should the defendant accept this as a notice of dishonor to him and take care of the note? There is no intimation in the paper that the holder intended to look to him for payment. On the contrary, the notice is that the holder will look to Marshall, his immediate prior indorser, for payment. This he had a legal right to do, and was not compelled to notify the defendant or any other indorser or to demand payment of him. If Marshall desired to hold the defendant responsible as a prior indorser it was incumbent upon him to give the latter notice of dishonor. The defendant was justified in treating the paper delivered to him by the notary as a notice to Marshall, as the address on the envelope and notice disclosed, and that the purpose was to notify Marshall of dishonor for the purpose of charging him with payment of the note. If either the envelope or the notice had been addressed to the defendant, or if neither had been addressed to him, the plaintiff's contention that the notice was for the defendant would have some ground for its support. If, when he delivered the paper, the notary had notified the defendant verbally that the note had been dishonored or that the written notice was for him, there would be sufficient to charge the defendant with notice of dishonor. But none of these facts can be found in the case. Assuming that the defendant opened the envelope and read its contents, he simply obtained the knowledge that the note was dishonored and that the holder would look to Marshall, the last indorser, for payment. This, as we have seen, is not sufficient under

the cases to fix the defendant, as an indorser, for the payment of the note.

For the reasons above stated, the second assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

SECTION 6.—WHEN PRESENTMENT AND NOTICE OF DISHONOR UNNECESSARY

BARTON v. BAKER.

(Supreme Court of Pennsylvania, 1815. 1 Serg. & R. 334, 7 Am. Dec. 620.)

Assumpsit by the plaintiff as indorsee of a promissory note, against the defendant as indorser.

It appeared in evidence at the trial that the note was drawn on the 2d June, 1808, by James Brown & Co., in favor of John Baker, the defendant, by whom it was indorsed, and that it was payable in four years after date; that the house of James Brown & Co., which was composed of James Brown and Armat Brown, was insolvent at the time the note was drawn, and continued to be so until it became due; that it was given for a debt previously contracted, and was received on the credit of Baker only; that several months before it was payable Armat Brown executed an assignment of all his estate, real and personal, to the defendant, to indemnify him for certain advances of money, and for indorsements on account of the firm of James Brown & Co. When the note became due, which was on the 2d and 5th June, 1812, James Brown was in Europe; but a demand for payment was made on Armat, who was then in this city, which not being complied with, it was protested. On the 15th of the same month, notice of nonpayment was given to the defendant, who observed that it was out of time, but did not deny that he was responsible, and said that his ability to pay would depend upon the arrival of a vessel.

Under these circumstances the defendant contended that the holder of the note had been guilty of such laches as to discharge the indorser from his liability to pay it.

His honor, Judge Yeates, before whom the cause was tried, on 2d February, 1814, charged the jury that, if the defendant knew of the insolvency of James Brown & Co. at the time he indorsed their note, he could not urge the want of due notice to discharge himself from the payment of it.

The jury accordingly found for the plaintiff, and the case now came before the court on a motion by the defendant for a new trial.[56]

TILGHMAN, C. J. The objection to the verdict in this case is that due notice of nonpayment by the maker of the note on which the ac-

[56] The arguments of counsel and the concurring opinion of Yeates, J., are omitted.

tion is founded was not given to the defendant, who was the indorser. It is confessed that due notice was not given; but the plaintiff contends that, under the circumstances of the case, notice was not necessary. The circumstance principally relied on at the trial, and on which the plaintiff had the charge of the court in his favor, is that at the time when the note was made and indorsed, and also at the time when it fell due, it was known to the defendant that James Brown & Co. were insolvent. If the case rested solely on this objection, I should be for granting a new trial, because the cases cited by the plaintiff, of De Berdt v. Atkinson, 2 H. Black. 336, and Cornay v. Da Costa, 1 Esp. Rep. 302, have been overruled in Nicholson v. Gouthit, 2 H. Black. 609, and Esdaile v. Sowerby, 11 East, 114. The case of Jackson v. Richards, 2 Caine's T. Rep. 343, agrees with the law as settled by the last English cases. But I do not rest my opinion solely upon the authority of these cases. The reason of the thing demonstrates that the insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency, and it rarely happens that a man is totally insolvent. So that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own, he may have friends, who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser. But it is almost impossible to prove that it might not have been of use. Therefore it is necessary.[57]

There is another circumstance in this case, however, operating powerfully in favor of the plaintiff. The house of James Brown & Co. consisted of James Brown and Armat Brown. When the note fell due, James Brown was in Europe, and Armat Brown in this city. A few months before it was due the defendant received from Armat Brown an assignment of his whole estate, for the purpose, among other things, of indemnifying him against his indorsements on account of James Brown & Co. Now, by the taking of this assignment, it is not unreasonable to presume that the defendant took upon himself the payment of the indorsed notes, especially as when he did receive notice (10 days after the note fell due), although he knew and remarked that it was out of time, he did not deny his responsibility, but said that his ability to pay would depend on the arrival of a vessel. I agree, therefore, with Bond v. Farnham, 5 Mass. 170, 4 Am. Dec. 47, where it was held that in such a case the indorser dispenses with notice. Inasmuch, then, as it appears upon the whole of this case that notice of nonpayment was not necessary, no injustice has been done by the verdict, and therefore a new trial ought not to be granted.[58]

New trial refused.

[57] But see West Bank v. Haines, 135 Iowa, 313, 112 N. W. 552 (1907).

[58] Compare Kramer v. Sandford, 4 Watts & S. 328, 39 Am. Dec. 92 (1842).

CREAMER v. PERRY and Trustee.

(Supreme Judicial Court of Massachusetts, Middlesex, 1835. 17 Pick. 332, 28 Am. Dec. 297.)

Assumpsit on a promissory note dated January 27, 1834, for the sum of $697.68, made by Isaac Thayer, of Sherburne, payable to the defendant or his order in six months from the date, and indorsed by the defendant.

It was agreed by the parties that in February, 1834, Thayer stopped payment, and assigned all his property for the benefit of his creditors to one Choate and John M. Perry, who was summoned as trustee in the present action; that in the assignment the defendant, who was the father-in-law of Thayer, was a preferred creditor, and was fully secured for all his demands and liabilities; that shortly after the assignment all the creditors of Thayer, excepting the plaintiff, agreed to give Thayer an extension of the time of payment of their respective claims for four, eight and twelve months, provided all the creditors should assent to it; and that Thayer, although the plaintiff did not agree to such extension, took possession of the property so assigned, proceeded to dispose of it as before the assignment, and continued to transact business in his own name, until after the note became due.

A witness produced by the plaintiff testified that the plaintiff delivered the note in question to him on the day after it became due, with directions to collect the money of Thayer; that on the same day he called upon Thayer, who proposed to renew the note for the sum of $350, and to pay the residue in cash; that this proposal was declined; that a few days after the note became due the witness was told by Thayer that he had conveyed away all the property in his shop; that the witness then called on the defendant, who lived in Sherburne, and informed him that he called, by the request of the plaintiff, to settle the note, it not having been paid by Thayer; that the defendant said that he knew that the note was unpaid; that Thayer had endeavored to induce the plaintiff to renew the note for the sum of $350, and to receive the residue in cash; that he, the defendant, had indorsed a note for that amount for the purpose, but the plaintiff had refused it, and that Thayer's ability to pay it would depend upon his getting accommodation at the Tremont Bank; that before leaving the defendant the witness inquired of him what would be done about the note, and the defendant said that "the note will be paid"; that the defendant, in the course of the above conversation, also said that he had received no letter informing him of a demand of payment and of nonpayment of the note by Thayer; that the witness inquired of the defendant if he had the benefit of the property assigned by Thayer to Choate and Perry for his indemnity, and the defendant replied, either "I had the ben-

efit," or "I am to have the benefit of it"; that he asked the defendant if he knew what Thayer had done with his goods that he had in the store the last week, and the defendant answered that he did not; that the witness did not understand from the defendant that he, the defendant, was a preferred creditor, or that he was to have any benefit under the new assignment by Thayer to his brothers, or that the defendant knew of any second assignment.

The plaintiff was nonsuited.

If, in the opinion of the court, it would be competent for the jury to find a verdict for the plaintiff on the foregoing evidence, the nonsuit was to be taken off, and a new trial granted; otherwise, judgment was to be rendered for the defendant.

SHAW, C. J., delivered the opinion of the court. It was conceded, that no seasonable demand had been made on the promisor, and no notice given to the indorser. The plaintiff relied upon a waiver, as an excuse for want of demand and notice, placing it on two grounds: (1) That the promisor had placed funds in the hands of the defendant to meet the payment; and (2) that, with notice that there had been no demand and notice, the defendant had promised to pay the note.

This is rather matter of evidence than of law; that is, whether there is proper evidence to go to a jury, and whether it would be sufficient to warrant them in finding a waiver of demand and notice.

On the first ground we think that the most which could be made of the evidence is that after this note was made, but several months before it became due, the promisor made an assignment to trustees, upon trust among other things to secure the defendant for all debts due to him from the promisor, and to indemnify him against all his liabilities. Without stopping to consider whether, after this property was surrendered by the trustees, the defendant could have availed himself of it, we think the effect of this assignment was to secure and indemnify the defendant against his legal liabilities; and as his liability as indorser on this note was conditional, and depended upon the contingency of his having seasonable notice of its dishonor, his claim upon the property depended upon the like contingency.[59]

The second assignment does not affect the question. It does not appear to have been made till several days after the note became due.

And on the other ground, it is a rule of law that if an indorser, knowing that there has been no demand and notice and conversant with all the circumstances, will promise to pay the note, this is to be deemed a waiver.[60]

[59] But compare Bond v. Farnham, 5 Mass. 170, 4 Am. Dec. 47 (1809); Develing v. Ferris, 18 Ohio, 170 (1849).

[60] Accord: Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1 (1877); Glidden v Chamberlain, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479 (1897). Compare Aebi v. Bank, 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925 (1905); First Bank v. Gridley, 112 App. Div. 398, 98 N. Y Supp. 445 (1906).

But these rules in regard to notice and waiver are to be held with some strictness, in order to insure uniformity of practice and regularity in their application. Though questions of due diligence and of waiver were originally questions of fact, yet, having been reduced to a good degree of certainty by mercantile usage and a long course of judicial decisions, they assume the character of questions of law, and it is highly important that they should be so deemed and applied, in order that rules affecting so extensive and important a department in the transactions of a mercantile community may be certain, practical and uniform, as well as reasonable, equitable and intelligible.

In the present case we are of opinion that the evidence falls short of proving a promise by the defendant either to pay the note or see it paid. The agent of the plaintiff applied to the defendant, some days after the note had become due, obviously for the purpose of obtaining from him a renewed promise. The strongest expression used by the defendant in the course of a long conversation was, "The note will be paid." This is quite as consistent with hypothesis that it was a mere assertion of his expectation that it would be paid by the promisor as of a promise on his own part to pay it; and from the general tenor of the conversation we think it cannot be inferred that it was his intention, knowing of his discharge, to waive his defense, and promise to pay the note, or see it paid, at all events. This view of the evidence, considering that the burden of proof is upon the plaintiff, is decisive, and therefore the nonsuit must stand.

Judgment for the defendant.

MISER v. TROVINGER'S EX'RS.

(Supreme Court of Ohio, 1857. 7 Ohio St. 281.)

The declaration is on a bill of exchange for $3,150, drawn at Thornville, Ohio, December 28, 1849, by Trovinger (defendants' testator), Culbertson, Fisher, and Good, on Babcock & Co., New York City, payable to the order of Culbertson, five months after date, acceptance waived, and indorsed by Culbertson to Smith, and by him to plaintiff. The averments are of demand and nonpayment at maturity, and that the drawers had not, either jointly or severally, at any time before or at the time the bill became due and was presented for payment, any effects in the hands of the drawee, and that there was no consideration for drawing the bill, or for accepting or paying it, or any part of it, by the drawee, and that neither have the defendants, as executors, nor their testator, sustained any damage by reason of not having notice of the nonpayment of the bill by the drawee.

Plea—That the bill declared on was an accommodation bill, made for the exclusive accommodation of Culbertson; that all the drawers, other than Culbertson, were his sureties and accommodation drawers;

that, at the time of their so drawing, he agreed with them to look after the bill and take it up at maturity; that Smith discounted the bill with notice of these facts; that Culbertson at the maturity of the bill informed them that it had been taken up; that Culbertson was solvent until long after the maturity of the bill; that they supposed it had been paid, until on or about December 1, 1851, when Culbertson became, and has ever since remained, insolvent; and that Smith was the holder of the bill until long after its maturity, when it was indorsed to plaintiff.

To this plea there is a general demurrer.[61]

J. R. SWAN, J. The contract of a drawer is that he will pay the bill, provided it be duly presented and payment duly demanded of the drawee, and, in the event of nonpayment, he be duly notified thereof. These are, in general, conditions precedent to the liability of the drawer.

This general rule is not denied; but the plaintiff claims that the drawers in the case at bar were placed beyond the operation of this rule, and were not entitled to notice of nonpayment of the bill.

It is conceded on both sides that there were no funds in the hands of the drawee. The fact of drawing without funds, in the absence of other proof to explain it, is a fraud; for the bill is negotiated under the faith that the drawer has or will place effects in the hands of the drawee to meet the bill; and if he had no effects in the hands of the drawee, and knew that none would be placed there, and that the drawee would not meet the bill, the whole transaction is deemed fraudulent on the part of the drawer. Another, but subordinate, reason is given for this exception, that the drawer cannot, in such case, be in any way injured for want of notice of nonpayment. But it is the fraud in drawing and delivering such a bill, upon which the exception substantially rests; for bankruptcy or notorious insolvency of the drawee, or proof that in fact no injury resulted from want of notice, will not excuse the holder from giving the drawer notice. Notice, therefore, under this exception, is to be dispensed with in those cases where the drawer had no reason to expect, when he drew the bill, that it would be paid. Thus, in the case of Rucker v. Hiller, 16 East, 43, it was laid down that the drawer is entitled to notice, if he have reasonable ground to expect the bill will be paid, although he have no assets in the acceptor's hands. So, in the case of Lafitte v. Slatter, 6 Bing. 623, 19 Eng. C. L. Rep. 180, in which the defendant drew a bill on one Tebbs, under the expectation that a third person, not a party to the bill, who owed him, would provide funds for its payment, but neglected to do so, it was held that the defendant was entitled to notice of nonpayment. Indeed, the rule is too well settled both by English and American cases to admit of question, that if the drawer has reasonable grounds to expect that the drawee will receive, through the transactions of the drawer, or from some one else, funds to meet the bill, although the drawer

[61] The arguments of counsel are omitted.

had no assets in the hands of the drawee, the drawer is, notwithstanding, entitled to notice of nonpayment. 2 Smith's Lead. Cas. (Wallace & Hare's Notes) 55.

The bill in the case at bar was an accommodation bill, made for the exclusive accommodation of Culbertson, and all the drawers other than Culbertson were his accommodation drawers; and they expected Culbertson to provide funds to meet the bill.

Now, unless there be something in the fact that the drawers were joint drawers with Culbertson, we can perceive no difference in principle between their situation than any other drawers who in good faith draw a bill, under the expectation and belief that the same will be met by some third person, as in the case of Lafitte v. Slatter, above cited. There is no fraud; and whether Culbertson had made himself a party to the bill or not, if it was in fact drawn for his accommodation, they had a right to look to him as the person who would see that funds were placed in the hands of the drawee to meet the bill at maturity; and if not met, they were entitled to notice so as to have had an opportunity immediately to take up the bill and proceed against Culbertson.

It is true that if Culbertson had been the sole drawer of this bill, without assets in hand or any expected, no notice to him would have been necessary.[62] And such seems to have been his position and relation to the holder of this bill, so that no notice was necessary to him, and he may be treated as having notice of the dishonor of this bill. Such being the situation of Culbertson, it is claimed that inasmuch as Culbertson and his accommodation drawers form but one party to the bill, being joint drawers, no relation or rights between them, not growing out of the face of the paper, can be set up as ground for requiring notice of nonpayment, and, all being but one party, notice to one is notice to all, and, if notice is not necessary to one, it is not to the others.

But it is not true that the right to notice uniformly depends upon the fact whether the party is entitled to a remedy over on the bill itself against another party to the bill. The drawer of a bill never has any remedy over on the bill itself, unless it has been actually accepted; and if presented for payment at maturity, he is entitled to notice of its dishonor. An accommodation indorser is, in general, entitled to notice, although the bill was drawn without funds, and the party for whose accommodation he indorsed is a subsequent indorser, and consequently not liable to the accommodation indorser on the face of the bill. Brown et al. v. Maffey, 15 East, 216.

[62] Similarly, if for any other reason the drawer has no right to expect or require the bill to be paid by the drawee, presentment and notice to the drawer is not necessary. Scanlon v. Wallach, 53 Misc. Rep. 104, 102 N. Y. Supp. 1090 (1907). See, also, West Bank v. Haines, 135 Iowa, 313, 112 N. W. 552 (1907). Presentment and notice are not necessary to charge an indorser, if he has no reason to expect payment by the maker or drawee at maturity. Baumeister v. Kuntz, 53 Fla. 340, 42 South. 886 (1907).

Notice to Culbertson, the drawers not being partners, would not be notice to the other joint drawers. 3 Kent, Com. (8th Ed.) 135, notes b and 3; 4 Smedes & Marsh. 749; Story on Bills, § 299. Notice to one partner is notice to all, because each is the agent of all; and notice to an agent is notice to the principal. Mere joint drawers are not agents of each other in respect to notice.

But the fraud of Culbertson, in drawing without the expectation of meeting the bill, would not, we think, be tantamount to notice to his co-drawers; they drawing for his accommodation, under the belief that he would meet the bill.

In the case of Harris v. Clark, 10 Ohio, 5, it was held that a demand upon one of two or more makers of a joint and several note was sufficient to charge an indorser. The presentation of a note for payment to two or more makers of a joint and several note, on the third day of grace, especially where the makers reside at a distance from each other, is attended with embarrassments which do not arise on the giving of notice of nonpayment; and in holding that notice to one of two or more joint drawers or indorsers, not partners, cannot be deemed notice to all, we do not touch the question decided in Harris v. Clark.

Demurrer overruled.

HOLTZ v. BOPPE.

(Court of Appeals of New York, 1868. 37 N. Y. 634.)

See ante, p. 593, for a report of the case.

RINDGE v. KIMBALL.

(Supreme Judicial Court of Massachusetts, Suffolk, 1878. 124 Mass. 209.)

Contract upon a promissory note for $500, payable to the order of the defendant, and indorsed by him to the plaintiff.

At the trial in the superior court, before Pitman, J., without a jury, it appeared that no demand had been made on the note or notice of nonpayment given to the defendant; but it was admitted that the defendant wrote on the back of the note the words, "Waive demand and notice." The evidence was conflicting upon the question whether these words were written before or after the note was due.

The defendant testified that he wrote these words upon the note intelligently and intentionally, with a full knowledge of all the material facts. The judge ruled that such a waiver of demand and notice was as effectual after as before the maturity of the note, and ordered judgment for the plaintiff. The defendant alleged exceptions.

PER CURIAM. This point has been repeatedly determined by recent decisions of this court, and should not have been brought up again

Matthews v. Allen, 16 Gray, 594, 77 Am. Dec. 430; Harrison v. Bailey, 99 Mass. 620, 97 Am. Dec. 63; Third National Bank v. Ashworth, 105 Mass. 503.

Exceptions overruled.[63]

REED v. SPEAR.

(Supreme Court, Appellate Division, Fourth Department, New York, 1905. 107 App. Div. 144, 94 N. Y. Supp. 1007.)

HISCOCK, J.[64] This case was brought on for trial before the county judge and a jury. At the close of the evidence each side moved for a direction of a verdict, and therefore any questions of fact or divergent inferences from the evidence are to be regarded as having been settled in favor of the plaintiff.

The action was brought against the defendant as indorser of a promissory note made by one Harry A. Lamkin, dated at Sinclairville, Chautauqua county, N. Y., August 9, 1900, whereby said maker, for value received, promised "to pay Emma Reed, or bearer, four hundred dollars and annual interest in the following manner to wit: $100 of the principal August 9, 1902; $100 August 9, 1903; $100 August 9, 1904, and $100 August 9th, 1905, the interest to be paid annually on the 9th day of August of each year; the undersigned to have the right to pay any part or the whole of said principal sum before the same shall become due."

Recovery was sought with interest on the three installments of principal becoming due respectively August 9, 1902, August 9, 1903, and August 9, 1904. Upon the trial, plaintiff abandoned his claim as to the first installment, but recovered upon the last two. It is insisted by the defendant that such recovery was erroneous, that no proper or necessary evidence was given of the presentment or notice of dishonor of said note as to said installments, and that the evidence given by plaintiff tending to excuse him from presentment and notice of dishonor was incompetent and improperly received under his complaint.

We conclude that plaintiff has failed to establish the necessary notice of dishonor of said note as to said first installment, and cannot recover therefor, but that he established a right to recover as to the second installment embraced in the judgment.

Plaintiff having abandoned his claim to the installment becoming due August 9, 1902, we need not discuss that.

Lamkin, the maker of the note, died a few days before the installment of August 9, 1903, became due. A few days after the same became due, one Chessman was appointed administrator of his estate. Emma J. Reed, the payee and owner of the note, died March 7, 1904,

[63] Accord: Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455 (1906); Id., 196 Mass. 397, 82 N. E. 22 (1907).

[64] Parts of the opinion are omitted.

and subsequently plaintiff was appointed her administrator. No place of payment being specified in the note, and the person primarily liable thereon being dead; and no personal representative having been appointed, the holder of the note was excused from presenting the same for payment of the installment becoming due in August, 1903, under the provisions of section 136 of the negotiable instruments law (Laws 1897, p. 737, c. 612), which reads as follows: "Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found."

But as we construe the statute, the holder of the note, although excused under the circumstances from presentment for payment, was not excused from giving notice of dishonor to the indorser. Section 160 (page 739) of the statute referred to provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given * * * to each endorser and any * * * endorser to whom such notice is not given is discharged."

Section 143 (page 738) provides that: "The instrument is dishonored by nonpayment when: (1) * * * (2) Presentment is excused and the instrument is overdue and unpaid."

These sections seem to make it clear that, although presentment for nonpayment may be excused under such circumstances as existed in this case, the indorser is still entitled to notice of dishonor of the instrument by its being overdue and unpaid.

No proof was offered of notice to the defendant indorser of the dishonor of the note as to this installment, except as the plaintiff seeks to have it supplied by inferences drawn from certain conversations with the defendant, but which we feel are insufficient for that purpose. * * *

We pass to the consideration of the installment becoming due in August, 1904. At this time an administrator had been appointed of the maker of the note and also of the holder. The latter lived at Sinclairville, in Chautauqua county. The former resided at Fredonia, in said county, some distance from the former place, and connected therewith by railroad. At the time this installment became due he was, however, a member of a banking firm which had its place of business in Sinclairville, and was also interested in other business industries located in the same place, and was accustomed to spend more or less time in looking after said interests. Upon the day when the installment became due, plaintiff went two or three times to the banking office for the purpose of presenting the note to the maker's said administrator, but was unable to find him. He also sought him at the railroad station near the seat of his other business interests, and at a time when he might be expected to take or alight from a train, but did not find him.

Having failed to find him at about 9 o'clock in the evening, he drew a notice, of which the following is a copy:

"Sinclairville, August 9, '04.

"To W. N. Spear: Take notice that the last $100 installment of a note given to Emma J. Reed August 9th, 1900, by Harry Lamkin and endorsed by you fell due this day and remains unpaid at this hour of 9 p. m. and that I shall look to you for payment.

"C. M. Reed, Admin. E. J. Reed Est."

Upon the following day he sought to serve this notice upon the defendant at his store in Fredonia, but after one or more efforts, having failed to find him, delivered it, sealed and addressed, to defendant's wife in the store, who acted as his clerk and assistant. There is evidence that the notice was actually received by the defendant upon the date of service, August 10, 1904.

Upon this evidence the county judge was entitled, as a matter of fact, if not of law, to find a sufficient compliance by plaintiff with the provisions of the negotiable instruments law applicable to such a case. Under section 136, already quoted, the obligation existed to make presentment of the note to the personal representative of the maker if "with the exercise of reasonable diligence he could [can] be found." And, conversely, under section 142 (page 738), presentment for payment was dispensed with where the same could not be made "after the exercise of reasonable diligence." Section 167 (page 740) provided that the notice of dishonor "may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by nonacceptance or nonpayment." Sections 167 and 168 respectively provide that such notice may be given by delivering it personally or through the mails, and that it may be given either to a party himself or to his agent in that behalf.

The evidence fairly warranted a finding that reasonable diligence was exercised by plaintiff in his effort to present for payment the note to Mr. Chessman as administrator of the maker of the note. No question is raised but that the notice of dishonor was served in due time, and we think no question can be successfully made but that said notice was sufficient in form and properly served upon defendant's wife and agent, especially in view of the fact that it actually came into defendant's possession within the time allowed by law. * * *

Judgment reversed, in so far as it allows a recovery for the installment due August 9, 1903; otherwise, affirmed.[65]

[65] See Merchants' Bank v. Brown, 86 App. Div. 599, 83 N. Y. Supp. 1037 (1903), as to notice in case the indorser is dead.

TORBERT v. MONTAGUE.

(Supreme Court of Colorado, 1906. 38 Colo. 325, 87 Pac. 1145.)

MAXWELL, J.[66] A trial to the court below, without a jury, resulted in a judgment against appellant as indorser upon three promissory notes. It is conceded that there was no presentment of the notes for payment, as required by section 70, p. 225, and no notice of dishonor, as required by section 89, c. 64, p. 228, of the Acts of 1897, "Negotiable Instruments" (3 Mills' Ann. St. Rev. Supp. §§ 245m, 247d). But it is claimed that there was a waiver of presentment and notice of dishonor under sections 82 and 109 of the above statute. * * *

Over defendant's objection plaintiff's husband, who was acting as her agent in the matter, was allowed to testify, in substance, that at the time the notes were indorsed and delivered to witness by Mr. Fowler, of the firm of Torbert & Fowler, of which firm appellant was a member, Mr. Fowler said, quoting from the abstract of the record: "That they [meaning Torbert & Fowler] would be responsible for the interest and the principal when it becomes due; that I would have nothing to do whatever with the collection of the note, or the principal of it; that they would look after the collection of the note when it became due and pay me the interest when it became due"; and that the same statement was substantially repeated several times thereafter prior to the maturity of the notes. A motion to strike out all of this testimony interposed by defendant's counsel was overruled, and an exception saved.

There is evidence in the record to the effect that Torbert & Fowler were conducting a chattel loan and business chance business in the city of Denver; that the notes upon which this suit was brought were indorsed by Mr. Fowler in the name of Torbert & Fowler at the time they were delivered to appellee's agent; that the firm of Torbert & Fowler managed and conducted the entire business for appellee, collecting and paying over to her the installments of interest as they fell due and a portion of the principal of one of the notes, which seems to have been realized from the foreclosure of a chattel mortgage given to secure the note upon which a partial payment was made. In short, the evidence tends to prove that Torbert & Fowler were acting as the agents of appellee in the matter. Appellant did not introduce any evidence.

The judgment of the court, set forth in full in the abstract, conclusively shows that it was based, in part at least, upon the testimony of the witness as to a parol agreement made contemporaneously with the indorsement of the notes to appellee. It is settled in this state that the legal effect of a blank indorsement, which was the indorsement upon the notes sued upon in this action, cannot be varied by parol. Martin v. Cole, 3 Colo. 113; Dunn v. Ghost, 5 Colo. 134; Doom v.

[66] Part of the opinion is omitted.

Sherwin, 20 Colo. 234, 38 Pac. 56. This being the rule, all testimony as to a parol agreement between the indorser and the indorsee contemporaneous with the indorsement of the note sued upon was incompetent, and should have been rejected.

It is insisted by appellee that there is sufficient evidence in the record, exclusive of the incompetent testimony above referred to, to support the finding of the court to the effect that there was a waiver of presentment for payment and notice of dishonor. As seen above, by sections 82 and 109 of the negotiable instrument statute presentment for payment and notice of dishonor may be waived, and the waiver may be express or implied.

Appellant concedes this to be the law, but insists that the testimony relied upon, which is quoted from the abstract, supra, does not prove a waiver. The findings of the court were as follows: "I am compelled to find, from the evidence in the case, that the evidence discloses the fact that the conduct and promises and manner of transacting the business by the firm, on the part of Mr. Fowler, at that time misled and caused the plaintiff to rely upon those promises and upon that course of conduct, to the extent that she left the matter entirely to the firm of Torbert & Fowler to attend to the collection and take charge of the matter, and that the evidence discloses they got their pay for it and got their commission on this matter, and undertook the responsibility of doing it, and that was the cause, under the evidence at least, for the failure on the part of the plaintiff to present these notes and give any further notice of dishonor." * * *

The question to be determined is whether, upon a fair construction of the language used by Fowler, his conduct in relation to the matters in controversy, and his acts as agent of appellee, were calculated to mislead appellee, to put her off her guard, and to induce her to forbear taking the necessary steps to charge appellant as indorser. In Union Bank v. Magruder, 7 Pet. (U. S.) 287, 8 L. Ed. 687, the United States Supreme Court, according to the headnote, held: "Whether certain declarations by the indorser of a note amounted to a waiver of demand on the maker and notice to the defendant, or to a new promise in consideration of forbearance, are questions of fact for the jury, under instructions from the court, not mere questions of law." Declarations intermixed with acts and conduct, as in this case, seem to us to raise a question of fact to be determined by the court or jury. So the rule is stated by Daniel, § 1103, and Randolph, § 1383, quoted above. The court below found this fact against the appellant, and we do not feel at liberty to disturb it.

In view of all the circumstances surrounding this case, as disclosed by the transcript of the evidence, which has been read with great care, the judgment will be affirmed.[67]

[67] See In re Swift (D. C.) 106 Fed. 65 (1901).

CHAPTER III

TRANSFERROR

BICKNALL & SKINNER v. WATERMAN.

(Supreme Court of Rhode Island, 1857. 5 R. I. 43.)

Assumpsit on a contract for the sale of 65 bales of cotton, made by the defendant with the plaintiffs.[1]

AMES, C. J. This is a mixed contract of sale and exchange, by which the defendant, on the 24th day of November, 1856, engaged with the plaintiffs, through a broker, to sell to them a specified lot of Augusta cotton, being 65 bales marked "Hoppin," at 13⅝ cents per pound, for the note of one John E. Weeden for about $1,250, having then some four months to run; the balance to be secured by the note of the plaintiffs at six months. It is in proof, that about one-half of the sales of cotton in the market of Providence are made in this way of barter for the notes of third persons, in which it is understood, as sworn by the broker, and as has been frequently proved before us, that the notes are "put off"—that is, exchanged—for the cotton; the very purpose of the transaction on the part of the purchaser being to get rid of the risk of the solvency of the paper, even though he pay an enhanced price for the cotton. The testimony of the broker who conducted this bargain shows that, so far as the note of Weeden would go towards the price of the cotton at the agreed rate, such was the nature of this contract; time being expressly given to and taken by the defendant to make inquiries concerning the solvency of Weeden, before he bound himself to it. The contract, as of a present sale and exchange, was concluded by the assent of both parties, and was so entered in the broker's book on the evening of the 24th of November; and the subjects of the contract being perfectly identified by it, and nothing remaining to be done but mutually to deliver the stipulated cotton and notes, the effect of the transaction, in the absence of fraud, was at common law —and we have no statute which touches the matter—to vest the title to the cotton in, and place it at the risk of, the plaintiffs, and to vest the title to Weeden's note in, and place it at the risk of, the defendant. Such was the view which forced itself upon my own mind when the case was first tried before me with a jury, and such is the conclusion to which we have all arrived, upon the maturest consideration of the arguments and authorities which have been pressed upon our attention.

A well-known common-law principle, applicable alike to sales and exchanges of personal things, is that fraud or warranty is necessary

[1] The statement of the case, the arguments of counsel, and part of the opinion are omitted.

to render the vendor or exchanger liable, in any form, for a defect in the quality of the thing sold or exchanged. Applying this principle to the sale or exchange of the note of a third person, transferred by indorsement without recourse or by delivery merely, the vendee or person taking it in exchange takes the risk of the past or future insolvency of the maker, or other party to it, unless indeed, in case of past insolvency, the vendor or exchanger is guilty of the fraud of passing it off with knowledge of that fact.[2]

The case of a sale or exchange of a forged note is equally within the above principle; since the parting with it for value is a representation, and so a warranty, that it is the note of the persons whose note it purports to be—that is, is the thing as which it is sold or exchanged. Although decisions may undoubtedly be found departing from these ancient common-law principles, yet this is the settled doctrine of Westminster Hall, and is supported by the main current of American authorities. Byles on Bills, 122–125, 307, and cases cited, especially Camidge v. Allenby, 6 B. & C. 373; Gompertz v. Bartlett, 24 Eng. L. & Eq. 156; Gurney v. Womersley, 28 Eng. L. & Eq. 257; Hall v. Conder, 38 Eng. L. & Eq. 259, and cases cited; 2 Am. Lead. Cases (Hare & Wallace's Notes) 180–189. As remarked by Sergeant Byles in his valuable treatise, after quoting several conflicting American cases bearing upon this subject: "The confusion has arisen from neglecting to distinguish between questions of law and questions of fact." Byles on Bills, 122, note "i." In other words, what was the agreement of the parties with regard to the transfer of a note or bill—that is, whether it was by way of sale or exchange, or, in case of a precedent debt, whether by way of complete payment or as mere security for payment of it—is a question of fact, and varies with proof, direct and presumptive, in cases in other respects similar. It is obvious what contrariety of decision must necessarily arise if courts, mistaking their province, undertake to decide such questions as if they were questions of law; and, however they decide them, of what little value their decisions must be as precedents.

In case at bar, the matter of fact has been withdrawn from the jury, and, under the statute, has been submitted to us by the parties, along with the matter of law. We find, in fact, that the defendant agreed to take the note in question, so far as it would go, in exchange for his cotton; and this, without any fraud practiced upon him by the plaintiffs, either by expression or suppression, and without express warranty, on their part, of the solvency of the maker of the note. In such case, the law certainly implies no warranty by the plaintiffs of the solvency of the maker of the note; and we see no reason why they should not be entitled to the benefit of a contract fairly made by them, because the risk assumed under it by the defendant has chanced to turn against him.

[2] See Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404 (1859).

The case of Roget v. Merritt, 2 Caines (N. Y.) 117, is relied upon as sustaining the defense that by the insolvency of Weeden the consideration agreed to be given to the defendant had wholly failed before the execution of the contract by delivery, and upon that ground that he had a right to retract from the contract. The note existed at the time of the contract, like the sea-damaged goods sold during a voyage, or the annuity whilst the person upon whose life it was dependent was in extremis, and, though perhaps of little value, will, like them, support a contract of sale which is based upon it (Sutherland v. Pratt, 11 M. & W. 296; Hastie v. Couturier, 20 Eng. L. & Eq. 535); and it would be a singular perversion of a contract, the legal effect of which is that the risk of the value of a note is to be assumed by one contractor, to say, that he was freed from the contract upon the ground of failure of consideration, because the note did not turn out to be as valuable as he anticipated. * * *

Judgment for plaintiff.[3]

LITTAUER v. GOLDMAN.

(Court of Appeals of New York, 1878. 72 N. Y. 506, 28 Am. Rep. 171.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order affirming an an order of Special Term, which overruled a demurrer to the complaint herein. Reported below, 9 Hun, 231.

The complaint alleged, in substance, that defendant sold and transferred by delivery to plaintiff, for valuable consideration, a promissory note, which was void for usury in its inception; that plaintiff sued the makers, who interposed the defense of usury; that plaintiff notified defendant of the bringing of the action and of the defense set up, and requested him to take charge of the prosecution of said action, and that he would be held liable in case the defense was sustained; that plaintiff was beaten in said action and a judgment for costs rendered against him. It was not alleged that defendant had knowledge of the defect, or that any express representation or guaranty was made. The defendant demurred that the complaint did not state facts sufficient to constitute a cause of action.[4]

MILLER, J. The right of the plaintiff to maintain this action rests upon the ground that the note in question, which was sold and transferred by the defendant to the plaintiff, was invalid and void, by reason of its original usurious consideration. It is alleged that, being in violation of the statute against usury, it was no note, and by implication of law the defendant did warrant and undertake that the same

[3] Compare Dille v. White, 132 Iowa, 327, 109 N. W. 909 (1906); Gordon v. Irvine, 105 Ga. 144, 31 S. E. 151 (1898).

[4] Arguments of counsel are omitted.

was not usurious or illegal, but a valid and legal note. The complaint does not allege that the defendant had any knowledge of the usury or was a party to the same, but states that the seller by the act of transfer for a valuable consideration, impliedly warranted that the paper was genuine and all that it purports to be upon its face, and incurred an obligation by the sale to make the paper good, although he did not indorse or guarantee the same. The question whether an action will lie for the loss sustained by the plaintiff by reason of the note being usurious, and the recovery of the amount thereof thereby defeated, has never arisen under the precise circumstances presented in this case, and demands an examination of the principle applicable to the contract entered into upon the sale of paper of this description, and of the authorities bearing upon the subject.

The rule is well settled that generally one who transfers paper by delivery only incurs none of the liabilities which attach to an indorser, for the reason that the irresistible inference is that if he transfers it, and it is received without his indorsement, that such liabilities did not enter into the bargain or the intention of the parties. This rule, however, is not without exception, and the transferror of notes or bills by delivery warrants the genuineness of the signatures, and that the title is what it purports to be. If the paper is forged, the transferee is liable upon the original consideration, which has never been extinguished by the sale. 2 Parsons on Contracts, 37, 38. So, also, it is laid down by the same author that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be, and there is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability, and the assignment of a bill or note for a valuable consideration raises an implied warranty that the assignor has done nothing, and will do nothing, to prevent the assignee from collecting it. The reason given as to forged paper is that it is nothing, and the one who has transferred it has transferred nothing, and is therefore liable. Id. 39, 40.

The question whether paper tainted with usury, which is transferred by the holder without knowledge of this defect, can be regarded as within the principle of the exceptions stated, is not free from difficulty, and at first view there appears to be some ground for claiming that a note made in violation of a statute which declares usury to be a misdemeanor, and that all paper of this kind shall be void, should stand on the same footing as forged or other paper, which is excepted from the general rule. Although the reported cases do not decide the exact point, an examination of some of the leading authorities tends to throw some light on the subject.

In Marvin, Pres't of the Delaware Bank, v. Jarvis, 20 N. Y. 226, a note was transferred to the plaintiff which had been taken at a usurious premium by the defendant and the avails received by him. Upon being sued, the defense of usury was interposed, which was successful,

and the bank sued the defendant to recover the amount and costs of prosecuting the note. It was held that one who transfers a chose in action impliedly warrants that there is no legal defense to its collection arising out of his own connection with its origin, and that the party accepting the transfer is at liberty to act upon the implied assertion of the validity of the paper, and to bring an action for its collection, and when defeated to recover the costs incurred by him from his assignor. The opinion lays down the rule that the authorities hold the doctrine in general terms that the vendee of a chose in action, in the absence of express stipulations, impliedly warrants its legal soundness and validity, and that exceptions do not exist when the invalidity of the debt or security sold arises out of the vendor's dealing in relation to it. It is also said that the act of transferring the note was the strongest possible assertion that no legal defense existed. The defendant in the case cited had knowledge of the usury, which was not the fact here; and hence it differs from the case at bar, and is not decisive of the question; but the opinion is very strong in upholding the general doctrine referred to where there is a radical defect in the note.

In Webb v. Odell, 49 N. Y. 583, a recovery for the purchase price, was upheld where notes were sold for less than their face, upon a representation that they were business paper, when, in fact, they were accommodation notes, and thus usurious and void in the hands of the vendee. The decision is placed upon the ground that the thing sold differed in substance from what the purchaser was led by the vendee to believe he was buying, and the difference was so substantial and essential in its character as to amount to a failure of consideration. The representation that the notes were business paper was an important fact, and hence the decision does not exactly cover a case where the party transferring had no knowledge of the true character of the paper.

In Ross v. Terry, 63 N. Y. 613, the defendant sold a bond and mortgage to the plaintiff, which was usurious and void. The defendant was personally concerned in the making of them, and in the unlawful acts which vitiated them, and it was held that there was an implied warranty of the validity of the securities. It will be observed that here, also, the defendant had knowledge of the usury, and hence the case is not directly in point.

In Fake v. Smith, 7 Abb. Prac. (N. S.) 106, the defendants, who sold a usurious note to the plaintiff, were held liable upon an implied warranty by defendants, on the sale of the note, that there was no legal defense to an action upon it; but it appeared that the defendants were privy to the consideration of the note, and the facts and circumstances under which it was given and transferred.

The foregoing constitute the principal cases in this state which have a direct bearing upon the question arising where the notes transferred were tainted with usury. In the cases of Whitney v. National

Bank of Potsdam, 45 N. Y. 305, and Bell v. Dagg, 60 N. Y. 530, the notes were forged, and the implied warranty related to the genuineness of the signature, which, as we have seen, is expressly provided for in the elementary works.

In the case of Gemport v. Bartlett, 75 Eng. C. L. 849, an unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold without recourse by the holder. It was shown to have been drawn in the country where the parties resided, and was for that reason unavailable for want of a stamp, and it was held that the article did not answer the description of that which was sold, viz., a foreign bill, and hence the purchaser could recover back the price from the vendor. This case sustains the doctrine that the money might be recovered as paid under a mistake of fact, which seems to have been a mutual mistake, and the whole case appears to have been disposed of upon the ground that the article did not answer the description. There is some analogy between the case last cited and the one at bar, for here the note on its face purported to be valid, and was only shown not to be by proof of extrinsic facts, which affected the original consideration. The difference, however, is that in the case last cited the purchaser contracted for a foreign bill which required no stamp, and did not receive what he was entitled to, while here there was a secret defect unknown to both parties, and not provided for; and as was said by the Lord Chief Justice in Gemport v. Bartlett: "If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser."

From the authorities to which we have adverted, it appears that in every case where usury was involved there was knowledge of its existence on the part of the person who held and transferred the note. It is true that in Delaware Bank v. Jarvis, supra, it is remarked by the judge that he does not consider it a material circumstance that the defendant had knowledge that the note had not been negotiated prior to the time when it was received, and, as we have seen, lays down the broad rule that, in any case where there is not an express agreement, the vendor of a chose in action warrants, not only the title, but the soundness and validity, of the note. The opinion of the learned judge is entitled to great respect; but, as the facts show it was not necessary to go to this extent to sustain the decision made, it is not entirely controlling.

It is of grave importance whether a scienter is material for the purpose of upholding an implied warranty in a case of this kind. In Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163, Selden, J., lays down the rule "that whenever an article sold has some latent defect, which is known to the seller and not to the purchaser, the former is liable for this defect if he fails to discover his knowledge on the subject at the time of the sale." He proceeds to state that, where knowledge is proved by direct evidence, the responsibility rests upon the ground of fraud; but where the probability of knowledge is so strong that courts

will presume its existence without proof, the vendor is held responsible upon an implied warranty. And the difference between the two cases is that in the one the scienter is actually proved; in the other it is presumed. A scienter is, therefore, essential to establish an implied warranty; and, as we have seen, the cases to which we have referred all show knowledge on the part of the vendor. The cases which are cited to sustain the doctrine that the scienter is immaterial where there is a warranty either express or implied do not go to that extent.

In Evertson v. Miles, 6 Johns. 138, the action was assumpsit for a breach of warranty on the sale of a horse, and the judge upon the trial rejected evidence to show that the representations proved were false, and decided that the plaintiff must show an express warranty, otherwise they could not recover upon the declaration. This ruling was sustained by the higher court, and it was said that there is no case which permits a plaintiff to establish deceit and fraud, when he declares only in assumpsit on a warranty express or implied. The question presented related to the form of the complaint, and has no application to the case now considered, where the point is, What constitutes an implied warranty upon the sale of a chose in action?

In Ross v. Mather, 47 Barb. 582, the action was for a false warranty in the sale of a horse, and it was held it was unnecessary for the plaintiff to make proof of the scienter; but proof of the warranty was sufficient, and whether the defendant knew the warranty was false at the time of making it was of no importance. The warranty in the case cited was express, and of course, when proved, made out a case. Here the question is, where there is no express warranty and the evidence does not show knowledge or deceit, whether any implied warranty is made out, and the cases cited furnish no light on that subject.

In Williamson v. Allison, 2 East, 446, the warranty was proved and the same rule was laid down. The reason of the rule was stated by Lord Ellenborough to be that the plaintiff was equally entitled to recover on the same proof, by striking out the whole averment of a scienter. This is apparent, and hence the rule last stated has no application to a case where the warranty is necessarily dependent upon proof of knowledge. Without proof of such knowledge no warranty is made out, for there is only the naked fact that the plaintiff purchased the notes, and as we have seen there is no reported case which holds that where such purchase is made without actual knowledge by the defendant that an implied warranty is established.

It is true that some of the cases to which we have referred hold that express representations are not necessary to establish a case and fix a liability, but in all of those where the notes were affected by usury the evidence showed that such fact was known to the defendant. The case of a forged instrument, as we have seen, rests upon a different principle, viz.: That the note is no note, and hence none of the cases

cited aid the plaintiff. The doctrine that an action can be maintained to recover back the purchase price paid under a contract of sale of personal property, without proof of warranty or fraud, where, upon delivery of the property, it proves utterly valueless, and where an offer to return has been made and refused, which is held in Stone v. Frost, 61 N. Y. 614, is scarcely applicable to negotiable paper which must be governed by entirely a different rule. In the latter case, where the transfer is made without indorsement, it is not unreasonable to suppose that certain liabilities did not enter into the consideration of the transfer, and had it been so intended some agreement would have been made in regard to the same.

The authorities cited in Parsons on Contracts, supra, in the note, to uphold the rule stated that there is an implied warranty that the parties are under no incapacity to contract, do not sustain the doctrine laid down in the text. In Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358, and 3 Metc. (Mass.) 469, the note was indorsed by a minor, and the action was for deceit in procuring the minor to indorse it, and then putting it in circulation. Knowledge was a necessary ingredient of the plaintiff's action, and hence the case cited is not in point. In Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682, where the note was invalid, as one of the signers of the same was insane, and had successfully defended on that ground, the case turned somewhat upon the construction to be given to a written assignment to the plaintiff, which it was held must be construed as an express warranty on the part of the defendant that it was a valid note, and that the signers were of sufficient capacity to contract, and although, in the opinion, the judge was inclined to think that there was a warranty implied by law from the sale of the note, that question was not in the case; nor do the text-books sustain the doctrine as stated in Parsons in reference to incapacity.

In Story on Promissory Notes, § 118, it is said that the holder warrants by implication, unless otherwise agreed, that he is the lawful holder and has title; that the instrument is genuine, and not forged or fictitious; that he has no knowledge of facts which prove the instrument, if originally valid, to be worthless, either by a failure of the maker, or by its being paid, or otherwise to have become void or defunct.

In Chitty on Bills, p. 245, it is laid down that where a person obtains money on a note, and it turns out to be forged, he is liable to refund the money to the party from whom he received it, on the ground that there is, in general, an implied warranty that the instrument is genuine. Again, at page 247, it is said: "If a man assign a bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would in all cases be compellable to repay the money he had received." It is knowledge of the defect which renders the party liable for a note which is of no value, and this rule applies to a note which is tainted with usury.

In Ferns v. Harrison, 3 D. & E. 757, the same rule was laid down. In the case last cited the holder of a bill of exchange desired to get it discounted, but refused to indorse it, and delivered it to another party, who passed it off for that purpose to a third party, informing him to whom it belonged, and such last-named party disposed of it by indorsing it, being prevailed upon to do so by the person who delivered it to him. Although the original owner afterward promised to pay the bill, it was held that such promise cannot support an action brought against him by the indorser. Lord Kenyon says: "It is extremely clear that if the holder of a bill sends it to market without indorsing his name, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counterfeit into circulation to impose upon the world instead of current coin. In this case, if the defendant had known the bill to be bad, there is no doubt that he would have been obliged to refund the money." See, also, Byles on Bills, 158, 159; Story on Bills, § 111; Edwards on Bills, 191.

In Lambert v. Heath, 15 M. & W. 485, the defendant, a share broker, bought for the plaintiff scrip certificates, which were sold in the share market, at a premium, as "Kentish Coast Railway Scrip," and were signed by the secretary of the railway company. The genuineness of the scrip was denied afterwards by the directors, who alleged that it was issued without authority. In an action brought to recover back the price on the ground that it was not genuine, it was held that it was a proper question for the jury whether what the defendant intended to buy was that which was sold in the market as such scrip. Alderson, B., said: "It appears that it was signed by the secretary of the company; and if this was the only Kentish railway scrip in the market, as appears to have been the case, and one person chooses to sell and another to buy that, then the latter has got all he contracted to buy." The scrip was of no value, because it was not genuine, as the note here is worthless, by reason of the usury. The same principle is applicable in both cases, and the plaintiff cannot recover unless it is made to appear that the plaintiff intended to purchase and the defendant to sell the note without the alleged defect.

In Hall v. Conder, 26 L. J. (C. P.) 138, an action was brought to recover money agreed to be paid upon the sale of an interest in a patent right. One of the pleas interposed to the declaration was that the invention was not new in England, and was worthless, and the plaintiff was not the first inventor. To that there was a demurrer, and it was held that there was in the agreement no warranty, express or implied, that the patent was indefeasible, and no fraud being alleged, and the defendant having the same means of knowledge as to the novelty and value of the patent as the plaintiff, the plea was bad. The rule is laid down by Caswell, J., that on the sale of a known ascertained article there is no implied warranty of its quality.

The examination we have made of the question shows that the law in regard to the transfer of negotiable bills of exchange and promissory notes, as laid down for a century or more, only excepts two cases as coming within the doctrine of an implied warranty, viz., a warranty of title, and that the instrument is genuine and not forged. There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note. To uphold such a doctrine would be an innovation upon a settled principle of law and the establishing of a new and different rule from that which has governed the sale and transfer of this species of property for a long period of time. It is at least exceedingly doubtful whether it would be expedient to inaugurate a new and questionable rule of conduct for the government of transactions of this description, even if the law permitted it to be done. The hardship which may fall upon the plaintiff by the purchase of the paper in question may operate quite as harshly on the defendant, as the assumption is that he had no knowledge of the inherent vice which affected the note. It is difficult to apply the rules of law in all cases with exact justice. In fact, if the rule be as the authorities hold, and as should be if it is not well understood, that the purchaser of paper of this description takes it at his own hazard and risk without any warranty, unless he chooses to require such an indemnity and makes it a part of the contract no serious inconvenience or injury can follow. The doctrine of caveat emptor applies, and the fault is with the person who fails to exact a warranty, if it turns out that he has been mistaken or has unfortunately made an unprofitable or a bad bargain. Neither party has any just ground of complaint in such a case.

The result is that the judgment was wrong and must be reversed, with leave to the plaintiff to amend his complaint upon the usual terms in such cases. All concur, except EARL, J., dissenting.

Judgment accordingly.[5]

[5] Contra: Giffert v. West, 33 Wis. 617 (1873).

"There is an exceptional case, Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171 (1878), which holds that the common-law obligation, as to the implied warranty of identity in the thing sold, in the case of commercial paper, extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper, differing from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented here by the argument of the defendant in error, to which we have just called attention; that is, that it admits the common-law rule and then denies its essential result by eliminating conditions of nonexistence which are necessarily embraced by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to, for either the principle of warranty of identity must be accepted or rejected. It cannot be accepted, and its legitimate and inevitable results be denied. The rule there announced was in conflict with previous decisions

PACKARD et al. v. WINDHOLZ.

(Supreme Court, Appellate Division, Fourth Department, New York, 1903. 88 App. Div. 365, 84 N. Y. Supp. 666.)

SPRING, J. Adolph Truman made his promissory note for $50, dated July 31, 1902, to the order of C. D. Eaton, and due in three months from its date. The maker forged the indorsement of Eaton, who was his father-in-law, to the note, and then procured the defendant to indorse the same. The note, with these two indorsements appearing upon it, was presented to the plaintiffs, who were note brokers, to be by them negotiated for the benefit of Truman. The plaintiffs obtained one Packelnisky to indorse it, and, after indorsing it themselves, sold it to the New York State Banking Company for $55, and turned over the avails to the maker. The defendant and those subsequent to him believed the indorsement of Eaton was genuine, and the plaintiffs learned he was responsible. The banking company soon after suspended business, and before the maturity of the note it was taken up by the plaintiffs.

The maker also presented to the plaintiffs a note of $120, bearing the apparent indorsement of Eaton and the genuine signature of the defendant on its back, and this was put in circulation for the benefit of Truman, and purchased by the plaintiffs before maturity, the same as the note above described. The latter note, when indorsed by the defendant, was $20, and was fraudulently raised to $120 before it was presented to the plaintiffs. The notes were duly protested for nonpayment, and due notice thereof given to the defendant. The plaintiffs have been allowed to recover on the first note, and $20 on the second note.

The defendant, by his contract of indorsement, guaranteed the genuineness of the signature of Eaton, the prior indorser on each note, and that the note was a "valid and subsisting" obligation. Neg. Inst. Law (chapter 612, p. 734, Laws 1897) § 116; Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11; Erwin v. Downs, 15 N. Y. 575. The defendant expected that the note was to be negotiated for the benefit of the maker. He indorsed at his request, and the note was put in circulation not only within the legal contemplation of the contract of indorsement entered into by the defendant, but as he in fact intended. To be sure, the plaintiffs knew the note was to be used for the benefit of the maker, and that the defendant indorsed for his accommodation. These circumstances do not relieve the indorser from the effect of his contract. Neg. Inst. Law (Laws 1897, p. 727, c. 612) § 50, and section 55, as amended by Laws 1898, c. 336. One cannot enter into

in New York, and the decision is strongly criticised by the Court of Errors and Appeals of New Jersey in Wood v. Sheldon, 42 N. J. Law, 421, 425, 36 Am. Rep. 523." Meyer v. Richards, 163 U. S. 385, 411, 16 Sup. Ct. 1148, 41 L. Ed. 199 (1896).

this contract, knowing that he is indorsing solely for the benefit of another, and then shield himself from the enforcement of the agreement because the purchaser is apprised that the indorsement is without actual consideration. Such a construction of the contract of indorsement would impair materially the transfer of commercial paper, and nullify the effect of the contract.

The plaintiffs negotiated the notes without any knowledge or suspicion of any infirmity in them. They then purchased them before maturity from a bona fide holder, still without any information as to any vice in them. They are holders in good faith. Neg. Inst. Law (Laws 1897, pp. 732, 733, c. 612) §§ 91, 95–98.

The judgment should be affirmed, with costs.[6]

[6] Affirmed 180 N. Y. 549, 73 N. E. 1129 (1905). Accord: Willard v. Crooke, 21 App. D. C. 238 (1903); Leonard v. Draper, 187 Mass. 536, 73 N. E. 644 (1905).

PART IV

DISCHARGE

SECTION 1.—PAYMENT AND RENUNCIATION

DE SILVA v. FULLER.

(Nisi Prius, 1776. 1 Chitty, Jr. 392.)

Trover for a bill, draft, or check, drawn by one Cox on the defendants, who were bankers, payable to "No. 437, or bearer, on demand." It was drawn the 17th June, but dated the 18th. On the 17th the plaintiff received it, that day he lost it, and the same day (the 17th) it was presented to the defendants, who paid it. It was proved to be contrary to the usual course of business to pay drafts before the day on which they were dated, and on that ground the plaintiff had a verdict.

BURBRIDGE v. MANNERS.

(Nisi Prius, 1812. 3 Camp. 193.)

This was an action on a promissory note for £101. 15s. 5d. dated 11th October, 1810, drawn by J. Finney, payable three months after date at Fraser & Co.'s to the defendant, indorsed by him to one Tinson and by Tinson to the plaintiff.

The note was regularly presented for payment in the forenoon of the day it became due, when payment was refused; and in the afternoon of the same day the plaintiff caused notice of its dishonor to be sent to the defendant.

Park, for the defendant, objected that this was not sufficient notice of the dishonor. Finney, the maker of the note, had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonored. The notice therefore stated what was untrue, and was evidently premature.

Lord Ellenborough. I think the note was dishonored as soon as the maker had refused payment on the day when it became due, and the notice sent to the defendant must have answered all the purposes for which notice in such cases is required. The holder of a bill or note gives notice of its dishonor in reasonable time the day after it is

due; but he may give such notice as soon as it has been dishonored the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information.

By the defendant's evidence it appeared that this bill, being in the hands of Maude & Co., was paid in by them when indorsed only by the defendant to their bankers, Masterman & Co., who were to present it for payment. Maude & Co. had received it from Finney, the maker, as a collateral security for an acceptance of his, then in their hands overdue. On the 10th of January, four days before the note was due, some person unknown came to Masterman & Co.'s, where it lay, paid it, and carried it away without its being canceled, or any memorandum being made upon it. However, it had been indorsed by Tinson, and had come into the hands of the plaintiff, before it was due.

Park contended that after the bill had been once paid, it could not be reissued, and he relied upon Beck v. Robley, 1 H. Bl. 89, note.

Lord ELLENBOROUGH. Payment means payment in due course, and not by anticipation. Had the bill been due before it came into the the plaintiff's hands, he must have taken it with all its infirmities. In that case it would have been his business to inquire minutely into its origin and history. But receiving it before it was due, there was nothing to awaken his suspicion. I agree that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid; but if they do not, the holders of such securities cannot be affected by any payment made before they are due. While a bill of exchange is running, it remains in a negotiable state. I cannot limit its negotiability the last four days before it becomes due more than the first four days after it is drawn.

Verdict for the plaintiff.

THOROGOOD v. CLARKE.

(Nisi Prius, 1817. 2 Starkie, 251.)

This was an action by the indorsee against the acceptor of a bill of exchange, dated 29th of July, 1815, drawn by Powys on the defendant, for the sum of £40., payable two months after date, to the order of the drawer, and by him indorsed to the plaintiff.

Upon the evidence for the defendant, it appeared, that when the bill became due, it was in the hands of Cripps & Co., the bankers of Powys; and that on the 26th of October, some time after the bill had been due, Powys gave the defendant, after a settlement of the ac-

counts between them, a receipt in full of all demands; and that after this, the bill was in Powys' hands, for several months after having been refused payment.

Peake, for the plaintiff, insisted that this was not a sufficient answer, since it was not shown that the bill had been indorsed to the plaintiff, after it became due; but,

Lord ELLENBOROUGH held, that since Powys, who the 26th of October, gave a receipt in full of all demands, could not have sued upon the bill, which was due on the 2d of October, the plaintiff could derive no title from him.

Verdict for the defendant.[1]

JOHNSON et al. v. WINDLE et al.

(Court of Common Pleas, 1836. 3 Bing. N. C. 225.)

This was an action of trover to recover the value of the promissory note, set out as follows:

"Milford Wharf, London, 30th March, 1835.

"Sixty days after date, we promise to pay C. Johnson & Sons, or order, £30. value received in coals, ex ship Two Brothers, at Messrs. Gosling & Sharpe. W. & C. Windle."

The declaration was in the usual form, and alleged that the plaintiffs were lawfully possessed of the note as of their own property.

The defendants pleaded, first, not guilty; secondly, that the plaintiffs were not lawfully possessed as of their own property of the said promissory note in manner and form as the declaration alleged.

Upon these pleas issues were joined.

By order of a judge, and consent of the parties, the following facts were stated in a special case for the opinion of the court:

The defendants were the makers of the promissory note above set forth, and the plaintiffs were the payees therein mentioned.

[1] In an action by one who had lost a promissory note payable to bearer (in the form of a coupon), against the maker, which had paid it after maturity to the finder, the court said: "There is another circumstance in this case which tends to fix more clearly upon the defendant the duty of inquiry, and that is that the coupon was long overdue. The maker of a coupon cannot be exempt from the liabilities which attach to all negotiable instruments when overdue. It is an elementary principle of commercial law that negotiable paper overdue carries with it, on its very face, notice of defective title sufficient to put the transferee on inquiry. Gold v. Eddy, 1 Mass. 1; Vermilye v. Adams Express Co., 21 Wall. 138, 22 L. Ed. 609. Although the application of the simple rule to payment would be practically of rare occurrence, since notice of the loss or stealing would be given in almost every case, there is no reason why a distinction should be made in this respect between transfer and payment, and no such distinction is consistent with the language of Chief Justice Shaw in Wheeler v. Guild [20 Pick. 545, 32 Am. Dec. 231], before cited. After maturity, a coupon, like any other negotiable security, loses the protection of the law merchant, and becomes a mere chose in action. There is no presumption of law that the party presenting such a chose in action to the party liable to pay is the true holder." Hinckley v. U. P. R. R., 129 Mass. 52, 60, 37 Am. Rep. 297 (1880).

The note in question was made and drawn by the defendants on the day of its date, and delivered by them to the plaintiffs in the usual course of business, in part payment for part of a cargo of coals ex ship the Two Brothers.

The note was afterwards stolen from the plaintiffs; and at the time it was so stolen there was no indorsement upon it.

On the day when it became due, Messrs. Wilkins were holders of the said note for value, and the same was presented by a clerk of Messrs. Glynn & Co., bankers in London, on account of the said Messrs. Wilkins to Messrs. Gosling & Sharpe, for payment, who, as the defendants' bankers, paid the note and debited the defendants' account with the sum paid. The note was afterwards handed over to the defendants, in whose possession it still remained.

Upon the delivery of the note to the defendants by Messrs. Gosling & Sharpe, and whilst it remained in the defendants' possession, and before the commencement of this suit, the plaintiffs demanded the note of the defendants, but they refused to give it up. Afterwards the present action was commenced.

The promissory note was never indorsed by the plaintiffs, or by their authority, nor was any person ever authorized by them to receive the amount thereof. At the time when the note was handed over to the defendants, the following indorsements appeared upon the back of it.

"By C. Johnson & Sons to Mr. John Atkin.

"John Atkin.

"George Wright."

All the indorsements on the notes were forgeries in the handwriting of one George Wryghte, who, at the time the note was made and delivered to the plaintiffs, and for some time afterwards, was a clerk in their employ. The note was stolen from the plaintiffs by the said G. Wryghte, whilst he was in their service.

The defendants had no notice that the indorsement of "C. Johnson & Sons" was a forgery at the time their bankers, Messrs. Gosling & Sharpe, paid the note, nor till six weeks afterwards, when notice was given to the defendants of that fact upon the plaintiffs' first discovering that the note had been stolen.

If the court upon the circumstances above stated, should be of opinion that the plaintiffs were entitled to the property, and to the possession of the note when the same was demanded as aforesaid, and that there was sufficient evidence of a conversion by the defendants, the pleas were to be withdrawn, and judgment was to be entered for the plaintiffs by confession, damages £30. and interest, together with their costs and charges of this suit. But

If the court should be of opinion that the plaintiffs were not so entitled, or that there was not sufficient evidence of a conversion, then judgment of nolle prosequi was to be entered.[2]

[2] Arguments of counsel are omitted.

TINDAL, C. J. It would be of most dangerous consequence if we were to give legality to a forged indorsement of a bill of exchange, and that would be the effect of a judgment in favour of these defendants.

The general rule is, that no title can be obtained through a forgery. Here the indorsement upon the bill has been forged, and the only ground which has been urged to take the case out of the general rule, is, that there has been such gross negligence in the plaintiffs as to divest them of any remedy against the defendants. But for aught that appears on this case they may have acted with sufficient caution to exclude any such ground of defense. If such negligence were to be the defense relied on, it should have been stated in the case.

GASELEE, J. In the case relied on for the defendants, it was expressly found that there had been gross negligence on the part of the plaintiff.

VAUGHAN, J. The plaintiffs have fulfilled all the requisites to enable them to maintain an action of trover; and no fact is stated from which negligence can be inferred. It differs therefore entirely from the case in which negligence was expressly found.

BOSANQUET, J. I am of the same opinion. This instrument on the face of it, was marked as the property of the plaintiffs. By an indorsement which is a nullity, it has found its way into the hands of the defendants. It has been demanded of them, and refused; and that affords sufficient ground for an action of trover.

Judgment for plaintiffs.

MORLEY v. CULVERWELL.

(Court of Exchequer, 1840. 7 Mees. & W. 174.)

Assumpsit by indorsee against drawer of a bill of exchange for £100., dated 7th of March, 1840, drawn by the defendant on and accepted by Thomas G. C. Riley, payable to the order of the defendant three months after date, indorsed by the defendant to John Short, and by Short to the plaintiff. The defendant pleaded nine pleas, of which, however, the seventh and ninth only are material to this report.

The seventh plea stated that after the drawing and accepting of the bill of exchange in the declaration mentioned, and before the delivery of the same to the said T. G. C. Riley, before the same became due and payable, and before the commencement of this suit, and while the defendant, as such drawer as aforesaid, was the holder thereof, and entitled to sue upon the same, to wit, on the 20th of April, 1840, it was agreed between the defendant and Riley, that he, Riley, should execute a certain indenture, and thereby assign by way of mortgage certain leasehold premises to the defendant, to secure the payment of a large sum of money, to wit, £853., part of which, to wit, the sum of £703., was theretofore lent and advanced by the defendant to Riley, and

for part of which Riley, before the said 20th of April, 1840, gave to the defendant certain bills of exchange, drawn by the defendant on Riley, and accepted by him [stating four bills of exchange, one of which was the bill mentioned in the declaration]; and that the defendant should deliver up to Riley the said four bills of exchange, that is to say, the three bills of exchange in this plea mentioned, and the said bill of exchange in the declaration mentioned, as discharged and fully satisfied by the said T. G. C. Riley. Averment, that in pursuance of the said agreement, the said mortgage was executed by Riley, and accepted and received by the defendant in discharge and satisfaction of the said four bills of exchange, and thereupon the said bills respectively were given up and delivered to Riley, as paid and fully satisfied by him, Riley, the acceptor thereof, and not for the purpose of being transferred, indorsed, or otherwise negotiated; that the said bill in the declaration mentioned was indorsed and delivered by Riley to Short, without any consideration or value for the same, and without any authority or sanction from the defendant, as drawer thereof, and that Short indorsed and delivered it to the plaintiff without any consideration or value for the same, and the plaintiff now holds the same without having given any consideration or value for the same. Verification.

The ninth plea stated that the said bill of exchange was and is an instrument or bill liable to the charges and duty imposed by the statute in such case made and provided, and that the said bill afterwards, and after the drawing and accepting thereof, and before the same became due, to wit, on, etc., was fully paid and satisfied by the said T. G. C. Riley, and was then, to wit, on, etc., and after the said bill had been so fully paid and satisfied by Riley, according to the statutes in such case made and provided, without any new stamp, or the payment of any rate of duty chargeable thereon, reissued by the said T. G. C. Riley. Verification. To each of these pleas the plaintiff replied de injuria, on which issue was joined.

At the trial before Lord Abinger, C. B., at the last assizes for the county of Surrey, the delivery up of the bills by the defendant to Riley, the acceptor, on his executing a mortgage, was proved as stated in the seventh plea. It appeared also that Riley, before the bill in question became due, indorsed it to Short for a valuable consideration, who also, before it became due, indorsed it for a valuable consideration to the plaintiff. It was not proved that the plaintiff had any knowledge of the circumstances under which the bill had been negotiated by Riley. The learned Chief Baron thought that the seventh and ninth pleas were proved in substance, and directed a verdict on those issues for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, with £102. damages. The plaintiff obtained a rule nisi accordingly.[3]

[3] Arguments of counsel are omitted.

Lord ABINGER, C. B. I am of opinion that this rule ought to be made absolute. On the trial, it struck me that the pleas were substantially proved; but upon consideration I am satisfied that I was wrong. I think, under the circumstances, the seventh plea could not be supported, unless the allegation, that the plaintiff took the bill without any consideration or value, was proved. It seems to me that was an essential part of the plea, in order to make out the defense. As to the last plea, I think it is bad in point of law; but the question now is, whether it was proved or not. It is bad, on the ground that it does not allege a payment in satisfaction of the bill, after it became due. But even supposing that payment by the acceptor in satisfaction of the bill, before it became due, were a good answer in point of law to an action by an indorsee, the plea was not proved; because upon this issue the plaintiff had a right to expect proof of actual payment in money, not of a mere accord and satisfaction. If the bill were satisfied otherwise than by payment in money, the plaintiff had a right to expect that the particular kind of satisfaction should be set forth in the plea. Proof of payment, therefore, was essential to support this plea; and that not having been given, the defendant cannot maintain his verdict upon it.

With respect to the more general question which arises in this case, I am now satisfied, after some doubt, that the plaintiff is entitled to recover. The defendant, the drawer of the bill, agrees with the acceptor, while it is running, to deliver it up to him, in consideration of his having the security of a mortgage of property of the acceptor; and gives up the bill accordingly, without striking out his name as drawer. Before the bill becomes due, a party who is ignorant of this transaction discounts it for the acceptor, and, before it becomes due, transfers it for value to the plaintiff, who is also ignorant of the transaction. The question then is, whether the discharge of a bill by the acceptor, by an arrangement with the drawer before it is due, can affect the bill in the hands of an innocent holder for valuable consideration. I think it cannot. The contract of the drawer and of each indorser is, that the bill shall be paid by the acceptor at its maturity—not before it is due; that it shall be paid, as Mr. Peacock has observed, according to its tenor and effect—that is, when it becomes due. If, upon its being discharged before it becomes due, the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it, against his intention. It is in the hands of an innocent holder, who has no notice that it has been discharged. Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them; the parties may circulate them so as to give a title to a bona fide holder, before they become due. And wherein does this case differ from that? Therefore, a bill is not properly paid and satisfied according to its tenor, unless it be paid when due; and conse-

quently, if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent indorsee for value from recovering upon it. The rule must therefore be absolute.

PARKE, B. I entirely concur with the Lord Chief Baron, and think that in this case neither of the pleas was proved. [His Lordship stated the seventh plea.] Undoubtedly, if all the facts alleged in this plea had been proved, they would have amounted to a good defense; because the plaintiff would then have been in the same situation as Short, and Short as Riley, and as to Riley the bill was satisfied. But in order to establish the plea, it was necessary to prove the two allegations which put the plaintiff in the same situation with Riley, viz. that Riley indorsed to Short, and Short to the plaintiff, without value or consideration; whereas it was proved that there was a valuable consideration for both indorsements. The question therefore is, whether the fact of the acceptor having satisfied the bill before it became due, is any defense against a bona fide indorsee. I am of opinion that nothing will discharge the acceptor or the drawer, except payment according to the law merchant—that is, payment of the bill at maturity. If a party pays it before, he purchases it, and is in the same situation as if he had discounted it. The rule is laid down correctly by Lord Ellenborough, in Burbridge v. Manners, that a payment before a bill becomes due "does not extinguish it, any more than if it were merely discounted"; and that "payment means payment in due course, and not by anticipation." The party who takes a bill before it becomes due has no means of knowing whether payment has been anticipated or not. The seventh plea, therefore, was not proved. As to the cases that have been cited, they are all cases of bills paid at maturity, because they were payable on demand.

With respect to the ninth plea, the question now is, whether it was proved in fact. It is bad in point of law; because the payment mentioned in the stamp act must be taken to mean payment by the party liable, at the maturity of the bill, and according to the tenor of it; otherwise there have been many cases wrongly decided. But I agree that, even assuming the plea to be good, it was not proved in fact. It would be essential, in order to support it, to prove payment of the bill in money, and not merely a satisfaction of it by an agreement such as was proved in this case, which was no payment in the proper sense of the word. On a demurrer to this plea, for stating only that the bill had been "paid and satisfied," without stating the mode of payment, the plea would, I think have been held sufficient on the ground that those words would be construed to mean payment in money. It follows that, in order to support that averment in evidence, the proof should have been of a payment in money. Neither of these pleas, therefore, being proved the rule must be absolute to enter a verdict on those issues for the plaintiff.

GURNEY and ROLFE, BB., concurred.

Rule absolute.

ATTENBOROUGH v. MACKENZIE.

(Court of Exchequer, 1856. 25 L. J. Ex. 244.)

Action on a bill of exchange for £400., drawn by the defendant, accepted by one Tingay, indorsed by the defendant to Tingay, by him indorsed to Robert Attenborough (the plaintiff being Richard), and by him to the plaintiff.

Pleas—First, denying the indorsement to Tingay; secondly, denying the indorsement by Tingay to the plaintiff; thirdly, that while the bill was in the hands of the drawer and payee, and before it was due, the acceptor, Tingay, paid the defendant the amount (less the interest), and deposited the bill with Robert Attenborough, who fraudulently transferred it to the plaintiff.

Issues were joined on these pleas; and at the trial, before Alderson, B., it appeared that the defendant, having money due from Tingay, got him to accept the bill, and gave it to one Score to get it discounted. Score offered it to one Barton for that purpose, who took it to Tingay, and got from him £375., which was offered to the defendant, and by him accepted, he at the same time observing that he took it because the bill was in Tingay's hands, and that he, the defendant, was thereby discharged. But it did not appear that this had been communicated to Tingay. Before the bill was due, Tingay transferred it to Robert Attenborough on discount, and afterwards said "that all that he knew Robert Attenborough knew." After the bill was due, it came to the plaintiff. Burbridge v. Manners, 3 Campb. 193, was cited. The learned judge, upon this state of facts, directed a verdict for the plaintiff, reserving to the defendant leave to move to enter a verdict on either of the pleas.

A rule having been obtained accordingly, but no one appearing to show cause.

Bovill and Honyman, for the defendant, were called upon to support it. The acceptor, Tingay, had no authority to transfer the bill, either actual or legal.

[MARTIN, B. He did not require any authority other than that which was involved in the transfer of the bill to him for discount.]

That transfer by the defendant was on the understanding that it should not be transferred by Tingay, and that he took it to retire it as acceptor, and in discharge of the drawer.

[POLLOCK, C. B. The transfer of a bill cannot be clogged with any such secret condition, whether it be to the acceptor or any one else.]

It was mentioned to the agent who came from Tingay.

[ALDERSON, B. But not communicated to him.]

[MARTIN, B. On the expiration of a reasonable time after the agent brought the money, the transfer to Tingay, as indorsee, was complete; and if the defendant did not mean to make such a transfer, he should have returned the money.]

The evidence is that Robert Attenborough knew what Tingay knew, and therefore knew that the bill was not to be transferred.

[POLLOCK, C. B. Why not? Assuming that he knew all that Tingay knew, nothing that Tingay knew precluded his transfer of the bill.]

If a party take a bill, knowing that the transferror had no authority to transfer, it is not a valid indorsement. Marston v. Allen, 8 Mee. & W. 494, 11 Law J. Rep. (N. S.) Exch. 122.

[MARTIN, B. No "authority" was necessary. The interest in the bill was transferred to Tingay, who was a bona fide holder for value.]

Then, assuming the indorsements are prima facie proved, the special plea was sustained. Payment by the acceptor discharges the drawer. Morley v. Culverwell, 7 Mee. & W. 174, 10 Law J. Rep. (N. S.) Exch. 35.

[POLLOCK, C. B. Payment in due course, and payment as payment. In this case the money was paid before the bill was due, and by way of discount, not payment.]

The acceptor cannot reissue the bill after paying the amount, less the discount, in order to charge parties upon it, to whom he himself will be liable.

[POLLOCK, C. B. Not after paying it in due course. But this was not payment, it was discount; and as regards discount, the acceptor is in the same position as any other person. It cannot be contended that an acceptor or bona fide holder of a bill, by discounting it before it is due, cannot reissue it.]

Not if he is ultimately liable upon it.

[POLLOCK, C. B. He is always ultimately liable, except in the case of accommodation acceptances.]

It is clear the defendant understood that the bill was discharged.

[MARTIN, B. That only shows that he mistook the law.]

[POLLOCK, C. B. When a bill has been created according to the custom of merchants as a real commercial transaction, it is part of the general circulating medium of the country, and the acceptor, after its issue, stands with regard to a retransfer of it to him in the same position as any other person. He may indeed pay it to discharge it, but discounting it is not paying it; and if he discounts it, he may reissue it. Nothing will discharge the drawer but payment according to the law merchant. That is the doctrine of Morley v. Culverwell. Here the bill was not satisfied.

MARTIN, B. The defendant was bound by the transfer to Tingay, when he took the money of Tingay. He could not retain Tingay's money on any other terms than those which Tingay understood—the general terms of discount. He could not attach to the transfer secret terms or conditions of which Tingay never heard. If, indeed, there had been a bargain with Tingay not to transfer the bill, that would have been a bar to the action; but nothing of the kind appeared. As

to the case of Morley v. Culverwell, it confirms this view. There the bill was satisfied, here it was not. It was merely discounted.

ALDERSON, B., concurred. If an acceptor discounts a bill he may reissue it.

Rule discharged.

GREVE v. SCHWEITZER.

(Supreme Court of Wisconsin, 1875. 36 Wis. 554.)

This is an appeal from an order denying the motion of defendant for judgment on the counterclaim set up in his answer, which was not replied to. The only question presented on the appeal is, Does the counterclaim state facts sufficient to constitute a cause of action entitling the defendant to judgment upon it?

The material allegations in the counterclaim are that the defendant, nearly 20 years ago, at the request of one Arnold H. Greve, and in consideration of a loan to him of $1,100, executed his promissory note for $1,000, which was made payable to one Keller, or bearer, and delivered the same to said Greve; that Greve died single and intestate in 1857, greatly involved in debt, leaving his father and several brothers surviving him; that shortly after his death the note was found in the possession of the plaintiff, who represented himself as the owner thereof, and that it had been given to him by his deceased brother; that the defendant, believing these representations to be true, was induced to take up and exchange that note for another of $1,000 payable to the plaintiff or order, which latter note was secured by a chattel mortgage; that he has paid the plaintiff on the latter note various sums amounting to $625; that after these payments were made, he learned that the plaintiff was not the owner of the Keller note, and never received it as a gift from his brother, but obtained possession of it by undue and improper means; that the creditors and legal representatives of Arnold H. Greve were entitled to the note and its proceeds; and that as a consequence, the note and chattel mortgage given by the plaintiff in exchange therefor were without consideration and void. He claims, upon these facts, the right to recover of the plaintiff the moneys which he has paid him on account thereof, and that the complaint be dismissed.

COLE, J. The matters alleged by defendant, as above stated, are insufficient to show a good counterclaim. The consideration for the note in suit was the note surrendered, which still remains in the possession of the defendant. It is very obvious, therefore, that there is no failure of consideration, and that the defendant cannot be relieved from the payment of the substituted note and mortgage upon any such ground. Besides, as is well remarked by the counsel for the plaintiff, the allegations in the answer, while they may show that a fraud was perpetrated by the plaintiff upon the creditors and legal representa-

tives of Arnold H. Greve in obtaining the possession of the Keller note, still fail to show any fraud upon the defendant, and afford no reason why he should be permitted to recover back the money which he has already paid on his indebtedness. The Keller note was payable to bearer, and any arrangement which the defendant made for its extinguishment, or any payments which he has made in good faith upon the substituted paper, are protected in law, and valid. The plaintiff had the possession, and was presumably the lawful holder, of the Keller note; and the defendant had the right to deal with him upon that assumption. And he did discharge and extinguish that note by giving another note. Upon the latter note he has made payments in good faith, which he seeks to recover back. In equity and good conscience he owed this money to some one, and the question is, Can he possibly be compelled to pay it again? We think not. He is protected in law, and even if the plaintiff was not the true owner of the Keller note, that will not deprive him of his rights in the transaction. For he has paid his note to the presumptive owner, the person producing it, and the party prima facie entitled to receive payment thereof. The rule of law applicable to this question is clearly stated in Byles on Bills, in the following language:

"If a bill or note payable to bearer, either originally made so or become so by an indorsement in blank, be lost or stolen, we have seen that a bona fide holder may compel payment. Not only is the payment to a bona fide holder protected, but payment to the thief or finder himself will discharge the maker or acceptor, provided such payment were not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man." Chapter 15, p. 172.

In Story on Bills the doctrine is laid down in substantially the same language; and there can be no doubt of the rule upon the subject. Sections 415 and 416.

Now, within this rule, it is apparent that even if the plaintiff was a wrongful holder of the Keller note, yet the possession of it was presumptive evidence that he was the lawful owner; and any arrangement which the defendant entered into in good faith for its discharge, and any payments which he has made, are valid. It is quite immaterial whether these payments were made upon the original or substituted paper. In either case the payments will extinguish pro tanto his indebtedness, and he runs no risk of being compelled to pay it again, unless guilty of negligence, which is denied. Suppose the proceeds of the original note belong to the creditors or legal representatives of Arnold H. Greve; that does not concern him so long as he is under no obligation to respond to any one for moneys already paid in discharge of his debt. In any view we see no ground for holding that the defendant, upon the facts alleged, is entitled to recover back the money paid the plaintiff. This disposes of all questions arising upon the merits of the counterclaim.

It is insisted that the motion of defendant for judgment on his counterclaim was not disposed of when the court rendered judgment on the verdict, and that this is such an error or irregularity as should reverse the order appealed from. Assuming that the objection is borne out by the record, still, upon the views expressed upon the merits of the counterclaim, the error could not have affected any substantial right of the defendant. The order, therefore, should not be reversed by reason of the error or irregularity complained of. Section 40, c. 125, Rev. St.; Allard v. Lamirande, 29 Wis. 502–510; Bonnell v. Gray, 36 Wis. 574, decided herewith.

The order of the circuit court is affirmed.[4]

NASH et al. v. DE FREVILLE.

(Court of Appeal, [1900] 2 Q. B. 72.)

A. L. SMITH, L. J., read the following judgment: In this case the plaintiffs, who are tailors and money lenders, sue Major Freville upon five promissory notes amounting in all to £5,300., payable on demand, of which notes the defendant was the maker and a solicitor named Peed was the payee. These notes at one time had been in the plaintiffs' possession, though they had been fraudulently induced by Peed to hand them back to him, and the notes then got back into the defendant's hands, as hereafter will appear. There is also a count in trover.

This case is complicated, as ordinarily is the case when fraud intervenes in the matter of negotiable instruments; but, having heard excellent arguments on each side, for the reasons I will now state, I think the question in the case is: Did the defendant, when he received the notes back into his possession from Peed, take them under such circumstances as to give him a better title to the notes than Peed had when he gave them back to the defendant? If the defendant had not a better title than Peed had, then the plaintiffs, in my judgment, can succeed in this action; aliter, if the defendant had.

Peed was a solicitor who for years had carried on business at Cambridge, and down to September 29, 1897, when he absconded and afterwards became bankrupt, was a man of unimpeachable credit and above suspicion. Between the years 1885 and September, 1897, inclusive, Peed was the trusted solicitor of the defendant, and from time to time made advances of money to and disbursements for the defendant, and in January, 1895, the defendant owed him for so doing about £800. Peed then suggested that the defendant should give him a promissory note payable on demand by way of security for the debt. This the defendant did, and it was a note for £800., dated January 14,

[4] Compare Prouty v. Roberts, 6 Cush. (Mass.) 19, 52 Am. Dec. 761 (1850), ante, p. 428.

1895, payable on demand in favor of Peed, and it was expressly agreed between the defendant and Peed that Peed should not negotiate or part with this note. For further advances and disbursements the defendant made two other notes payable on demand in favor of Peed, and handed them to him. The one was dated January 31, 1896, for £500., and the other was dated April 4, 1896, also for £500., and there was the like agreement about not negotiating or parting with these two notes. The reason for this agreement as to Peed not negotiating or parting with these notes was that the defendant did not then wish to be called upon to pay the amounts represented by them, it being anticipated, as turned out to be the case, that in the month of June, 1897, when the defendant's son would come of age, the defendant, by means of barring an estate tail, would be placed in funds.

In the next year, namely, upon February 9, 1897, the defendant gave to Peed two notes, the one of £1,500. and the other for £2,000.; i. e. for £3,500. in all—payable on demand and in favor of Peed. These two notes were given to and taken by Peed to pay off the first three notes for £1,800. and to cover further advances. These two notes were also by agreement between the defendant and Peed not to be parted with or negotiated by him. The defendant did not take back from Peed the first three notes thus paid by the defendant, but left them in Peed's possession, and this, as will be seen, was what enabled Peed to commit the fraud which he subsequently practiced upon the plaintiffs as regards these three notes.

In the month of March, 1897, Peed, without the knowledge of the defendant, broke faith with him and negotiated all five notes with the plaintiffs, they paying to him the sum of £4,800. and taking a bonus of £500. for so doing. These notes were indorsed by Peed, and he also deposited with the plaintiffs an insurance upon the life of the defendant's son. In June, 1897, the defendant's son came of age, the estate tail was barred, the defendant became possessed of funds, and a settlement of accounts was then come to between the defendant and Peed, and the only material fact as to this settlement is that the defendant then gave to Peed £4,000. wherewith to pay the two notes for £3,500. and interest. The defendant did not get back from Peed those two notes when he paid them, but left them in Peed's hands, as he had done when he paid the first three notes. By his doing so Peed was enabled to perpetrate the fraud he subsequently practiced upon the plaintiffs as regards these two notes.

It is not denied that the plaintiffs, when they discounted the five notes for Peed, became holders of them in due course and for value, and without notice of anything which would have impeached the plaintiffs' title to sue the defendant or Peed upon these notes. That the plaintiffs could have sued the defendant upon these five notes I have no doubt, and the defendant would have been undefended. It is true that up to this point the plaintiffs have no cause of complaint and were in no way prejudiced by the defendant not having taken back the notes

from Peed as and when they were paid; and, on the contrary, the plaintiffs, by reason of the notes not having been returned by Peed to the defendant when they were paid, have been enabled to discount the notes for Peed at the rates they did, and were also enabled to enrich themselves by the sum of £500., being the bonus they took when they discounted them for Peed. But the prejudice to the plaintiffs comes in later on. The plaintiffs pressed Peed for payment of the notes, but could not get payment, and upon September 28, 1897, this took place. Peed, desiring to have the notes back, gave to the plaintiffs his check for £5,581. in exchange for the notes which they held for £5,300., and also what the plaintiffs call a contango—whatever that may mean—amounting to £86.; they preferring, I suppose, Peed's check coupled with the contango of £86. to the signature of the defendant upon the notes, with no contango. This, however, the plaintiffs were clearly entitled to do. The Lord Chief Justice finds, and I have no doubt correctly, "that the plaintiffs then voluntarily or intentionally parted with the notes, intending that Peed should take them, and intending that they should take and rely upon Peed's check which he had given in exchange for them"; and he also finds, and I think correctly, that "when Peed drew his check he knew that it would not be met, and he did not intend that it would be met, and in point of fact he was contemplating the perpetration of a fraud upon the plaintiffs."

That Peed defrauded the plaintiffs is clear. What is the effect of this? Before I discuss this, I should state that Peed, when he thus got back the notes by means of his worthless check in exchange, at once placed them in an envelope and sent them to the defendant, who received them upon September 29, 1897, and knowing, as was the fact, that he had paid them long since to Peed, and not knowing that Peed had ever parted with them, put them into the fire and treated the matter as at an end. Upon October 1, 1897, Peed's check was returned to the plaintiffs marked "referred to drawer." The plaintiffs made no communication to the defendant upon the matter until some four months after the check was thus returned, and the question arises, in these circumstances, who has the better title to the notes, obtained as they were by fraud from the plaintiffs, who were the bona fide holders for value of the notes? Now, the notes having been obtained by Peed from the plaintiffs by fraud, although the property in the notes passed to Peed, the plaintiffs as against Peed were entitled to disaffirm the transaction on discovering the fraud, and if, before the transaction with Peed was disaffirmed by the plaintiffs, the defendant had become holder in due course of the notes, it would then be too late in my judgment to disaffirm, so far as the defendant was concerned, and the plaintiffs could not then successfully sue the defendant either upon the notes or in trover; and the real question, therefore, as I have above stated, comes to this: Did the defendant, when he took the notes on September 29, 1897, from Peed, obtain a better title to them than Peed had? Which means: Did he take them bona fide, and for value,

and without notice of Peed's fraud, and before they were due? For, if so, the defendant would in my judgment have taken a better title to the notes than Peed had, and a title which would prevail over that of the plaintiffs.

That the defendant received back the notes bona fide and without notice of Peed's fraud is clear. The defendant, when he received the notes from Peed, knew nothing of Peed having ever parted with them, nor had he ever heard of the plaintiffs in the matter. That the defendant received back the notes before the fraud of Peed was discovered is clear, for he received them the day after the fraud was committed. But did he give value for the notes when he received them back, and did he take them from Peed before they were overdue? As to the question of value, what value did the defendant give for the notes when he took them back from Peed? He had given value for the first three notes when, upon February 9, 1897, he gave the second two notes to Peed in order to pay off the first three notes, and he gave value for the second two notes when he paid the £4,000. in July, 1897, to Peed to pay them off; but this was months before the fraud was perpetrated by Peed upon the plaintiffs, and before the defendant got the notes back on September 29, 1897. When he got the notes back the defendant gave nothing for them. How can it be said, then, that he took back the notes for value? For he did not. If the case cited of London & County Banking Co. v. London & River Plate Bank, 21 Q. B. D. 535, were to be held to apply to this case, we should have to hold that the defendant gave real value for the notes and then a supposed value over again for the same notes, which cannot be. But supposing the defendant did give value for the notes when he took them back, which in my opinion he did not, did he take the notes after they were due?

I cannot see how it can be held that defendant, when he received back the notes in September, 1897, though payable on demand, did not take them when overdue; for he must have known they were overdue if he thought about it at all, inasmuch as he had himself paid them off, the first three notes in February, 1897, and the last two notes in July, 1897. How can the defendant now say that they were not overdue in September, 1897, when he received them back? It seems to me that as the defendant did not give value for the notes when he took them back, and as, even if he did, the notes were then overdue, the defendant did not take a better title to them than Peed had, and that the plaintiffs, having disaffirmed, as they were entitled to do, the transaction with Peed, can maintain trover for the notes and bring an action upon the notes against the defendant, who has no better title to set up than that of Peed. I must point out that the difficulty which the defendant unfortunately is in arises through his own default in not getting the notes back from Peed when he paid them, thereby giving Peed the opportunity of cheating the plaintiffs as he did. It is a well-known principle of law that whenever one of two innocent persons must suffer by

the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. See the well-known cases of Lickbarrow v. Mason in 1 Smith's Leading Cases, and Babcock v. Lawson, [1879] 4 Q. B. D. 394, which contains matters very apposite to the present case.

In my opinion counsel for the plaintiffs are right in their construction of section 61 of the Bills of Exchange Act, which was so much relied upon by the defendant's counsel, and that section does not apply to the present case, and the words "in his own right" do not mean in contradistinction to a representative right as argued for the defendant.

For these reasons I think that the appeal must be allowed, and that judgment must be entered for the plaintiffs.[5]

SCHWARTZMAN v. POST et al.

(Supreme Court, Appellate Division, First Department, New York, 1903. 94 App. Div. 474, 84 N. Y. Supp. 922, 87 N. Y. Supp. 872.)

Appeal by the plaintiff, Abraham Schwartzman, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 16th day of November, 1903, which order reversed a judgment of the City Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 15th day of February, 1903, upon the verdict of a jury, and also (as stated in the notice of appeal) from a judgment of reversal entered in the office of the clerk of the city of New York on the 13th day of January, 1904, upon said order of the Appellate Term.

PER CURIAM. Determination of Appellate Term affirmed, with costs, on the opinion of the court below, and judgment absolute ordered for defendant, with costs.

VAN BRUNT, P. J., and PATTERSON, INGRAHAM, and MCLAUGHLIN, JJ., concur.

LAUGHLIN, J. (dissenting). According to the testimony of the plaintiff, the note was not paid, nor was it surrendered up to the defendant Post upon the understanding that it was to be deemed paid, but on the distinct agreement that the defendants were to remain liable for the balance for which plaintiff has recovered in this action. The defendants did not, therefore, in my opinion, by this surrender become holders of the note in their "own right," within the intent and meaning of subdivision 5 of section 200 of the negotiable instruments law, Laws 1897, p. 744, c. 612, and the transaction did not constitute a discharge of the note. The defendant Post merely became the bailee thereof for the payee.

[5] Collins and Romer, L. JJ., delivered concurring opinions, which, with the statement of the case and the arguments of counsel, are omitted.

The following is a part of the opinion delivered by FREEDMAN, P. J., in the court below:

This action was brought to recover an alleged balance of $1,750, claimed to be due upon a demand note for $5,000, dated May 1, 1899, payable to the order of the maker, the defendant Post, and indorsed by him and his father, the defendant Postawalsky. Postawalsky was not served with the summons and did not appear. After a trial by a jury, a verdict for the amount claimed was rendered in favor of the plaintiff. The plaintiff's complaint originally averred that he is "now the lawful owner and holder" of the note in suit, but it was subsequently amended by striking out the allegation that plaintiff was the "holder." The answer denied the delivery of the note to the plaintiff, and that he was the owner thereof, and set up, among other defenses, that the note had been delivered up and surrendered to Post, the maker, about April 9, 1900, and that defendant had ever since been the holder thereof.

At the beginning of the trial, the note, in pursuance of a notice given by plaintiff's attorney, was produced by the defendant Post, and by plaintiff's attorney offered and received in evidence. The testimony of the transaction out of which the cause of action arose, as given by the parties, is very conflicting, and a reading of the record convinces one that neither party has given a complete statement of the facts. The plaintiff's version, however, was accepted and believed by the jury, and must, therefore, for the purposes of this appeal, be taken as true, and, briefly stated, is as follows:

In 1898 plaintiff and the defendant Postawalsky were copartners in the cloak business. This partnership was dissolved by mutual consent in 1899, and plaintiff received the note in question for his interest in said business. Subsequently, upon demanding payment of the note of the defendant, Post told the plaintiff that he (Post) could not pay the full amount of the note, but would pay $2,000 if the plaintiff would give up the note. This offer was afterwards increased by Post to the sum of $2,500. Plaintiff then authorized his brother (Schwartz) to continue the negotiations with Post. For some reason, not appearing, the plaintiff had placed the note with one Kohn, who testifies that he also called upon Post in regard to obtaining payment of the note, and that Post refused to pay in full. Plaintiff's brother (Schwartz) testifies to similar conversations with Post. In all of the conversations Post is alleged to have said, in substance, that, unless the amount offered was accepted by the plaintiff, and the note given up, that he, Post, would "protect" himself; that "I have been through the mill once before, and know how to take care of myself." These witnesses also testify that Post promised to pay the balance of his indebtedness, but insisted upon the surrender of the note to him. Matters between the parties culminated in a meeting of Post, Kohn, one Kohler, attorney for Post, one Essberg, attorney for plaintiff or his brother, Schwartz, and Schwartz, at Essberg's office, at which time Post paid

$2,750 and Essberg $500 to Schwartz, who then gave the note to Essberg. The $3,250 was then paid plaintiff, and the note eventually given to Post, although when Post came into possession of the note does not appear, nor is it shown for what reason Essberg contributed the sum of $500 towards the amount paid the plaintiff.

At the close of the plaintiff's case, and again at the close of the whole case, the defendant's attorney moved to dismiss the complaint upon the ground that "the plaintiff has failed to establish a cause of action, and upon the ground that by his own admission of the delivery and surrender of the note by him to the defendant [the plaintiff] extinguished any liability on the note. * * * My contention is that the delivery of that note by the plaintiff to the defendant constituted a discharge and cancellation of that note."

I am of the opinion that the defendant Post is right in this contention. The cause of action is based wholly upon the note. Subdivision 5 of section 200 of the Negotiable Instruments Law (Laws 1897, p. 744, c. 612) provides that a negotiable instrument is discharged "when the principal debtor becomes the holder of the instrument at or after maturity in his own right." The instrument in question was a negotiable note. The term "holder" is defined in section 2, p. 720, as follows: " 'Holder' means the payee or indorsee of a bill or note who is in the possession of it, or the bearer thereof." And section 3 contains the following definition: "Person Primarily Liable on Instrument.—The person 'primarily' liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same."

The words of subdivision 5 of section 200, "in his own right," merely exclude such a case as that of a maker acquiring the instrument in purely a representative capacity. The case at bar comes exactly within these provisions. Post was the maker of the note, and primarily liable thereon. It was surrendered to him, and he became the "holder" thereof without fraud or mistake, in "his own right." Prior to the adoption of the negotiable instruments law it has been held that, if a note be surrendered by the payee to the maker, the whole claim is discharged. Jaffray v. Davis, 124 N. Y. 164–170, 26 N. E. 351, 11 L. R. A. 710; Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun, 559; Beach v. Endress, 51 Barb. 570, affirmed in Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176.

Whether the plaintiff can maintain an action upon the original indebtedness, or upon the defendant Post's promise to pay the balance due, the consideration therefor being the plaintiff's surrender of the note, need not now be determined. * * *[6]

[6] A fortiori the instrument is discharged when it is surrendered, either in exchange for a part payment which is accepted in full satisfaction (Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168 [1892]), or as a gift (Sherman v. Sherman, 3 Ind. 337 [1852]; Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176 [1882], semble).

FOSTER v. DAWBER.

(Court of Exchequer, 1851. 6 Exch. 839.)

Assumpsit. The first count of the declaration was on a promissory note, dated the 7th of December, 1845, made by the defendant, for payment of £500. and interest, on demand, to Clark, the plaintiff's testator. The second count was on a similar note for £500., dated the 20th of January, 1846.

Pleas, to the first and second counts. First, payment. Secondly, that after the making of the promissory notes, and before any demand of the sums of money therein mentioned, or of either of them, or of any interest thereon, and before any breach of the promises in those counts mentioned or either of them, the said J. Clark, in his lifetime, to wit, etc., exonerated, absolved, and discharged the defendant from, and then waived, performance of the promises therein mentioned, and payment of the said notes respectively, and of the sums of money and interest therein mentioned. Verification. Thirdly, that after the making of the promissory notes, and in the lifetime of J. Clark, to wit, on, etc., it was agreed between J. Clark and the defendant that the defendant should purchase a piece of paper marked with a certain receipt stamp, to wit, a 10s. stamp, to wit, of the value of 10s., with the moneys of the defendant, and that he should then fill up and write on the same to the tenor and effect following, that is to say: "Hull, 16th February, 1846. Received of Robert Dawber the sum of £1080., being the interest and principal on two notes, dated December, 1845, and January, 1846, and in full of all demands"—and that the defendant should suffer and permit J. Clark to sign the same; and that such agreement and purchase of the said piece of paper so stamped, and such writing on and filling up by the defendant, and suffering and permitting J. Clark to sign the same, should be, and should be accepted and taken by J. Clark, in full satisfaction and discharge of the several causes of action in the introductory part of this plea mentioned. The plea then averred performance of the agreement in terms, and that J. Clark accepted the same in satisfaction and discharge of the several causes of action. Verification.

Replication de injuria. Verdict for the defendant. The plaintiff obtained a rule nisi to enter a verdict for the plaintiff or judgment non obstante veredicto.[7]

Parke, B., said: The court has already disposed of all the points in this case except two. The first of these depends upon the question whether the evidence supported the second plea. [His Lordship, after reading that plea and stating the substance of the evidence, proceeded:] There is no doubt that the effect of that transaction of the 16th of February, 1846, is to show that the testator meant to discharge the

[7] The statement is abridged, and the arguments of counsel and part of the opinion on other points are omitted.

defendant from all liability upon the notes. But it was contended that, as the plea stated the transaction to have taken place before breach, the plea was not proved. The plea is inartificially drawn, and appears to have been copied from the precedents of a plea in discharge of an executory contract. Now, it is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts; and we think the words "before breach," when taken with reference to those instruments, are either idle or absurd. If they are to be taken as having any meaning in this plea, they must be read in conjunction with the context, and they merely amount to an allegation that Clark discharged the defendant from all liability before any demand of the sum of money mentioned in the notes. And if that be so, the plea was proved, for Clark exonerated the defendant before he called on him to pay the amount of the notes. We are, therefore, of opinion that the plea was proved.

The next question is, whether the plea is good after verdict. Mr. Willes disputed the existence of any rule of law by which an obligation on a bill of exchange, by the law merchant, can be discharged by parol, and he questioned the decisions, and contended that the authorities merely went to show that such an obligation might be discharged as to remote but not as between immediate parties. The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule. In the passage referred to in the work of my Brother Byles, the words "it is said" are used; but we think the rule there laid down is good law. We do not see any sound distinction between the liability created between immediate and distant parties. Whether they are mediate or immediate parties, the liability turns on the law merchant, for no person is liable on a bill of exchange except through the law merchant; and probably, the law merchant being introduced into this country, and differing very much from the simplicity of the common law, at the same time was introduced that rule quoted from Pailliet as prevailing in foreign countries, viz., that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or by any solemn instrument. Such appears to be the law of France, and probably it was for the reason above stated that it has been adopted here with respect to bills of exchange. But Mr. Willes further contended, that though the rule might be true with respect to bills of exchange, it did not apply to promissory notes, inasmuch as they are not put upon the same footing as bills of exchange by the statute law.

The negotiability of promissory notes was created by the statute 3 & 4 Anne, c. 9, which recites that "notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person or his order any sum of money therein mentioned, are not assignable or endorsable over, within the custom of merchants, to any other person" (that is one of the properties promissory notes are recited not to have); "and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note shall be assigned, endorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same." That appears to apply to cases of the original liability on a note, as well as to those cases where the liability has been created by the assignment of that instrument. Now, bills of exchange and promissory notes differ from other contracts at common law in two important particulars: first, they are assignable, whereas choses in action at common law are not; and secondly, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In both these important particulars promissory notes are put on the same footing as bills of exchange by the statute of Anne, and therefore we think the same law applies to both instruments. This court was of this opinion in a case of Mayhew v. Cooze (November 23, 1849, not reported), in which there was a plea similar to the present, although the expression of that opinion was not necessary for the decision of that case. The plea is, therefore, good after verdict. * * *

Rule absolute accordingly.

LEASK et al. v. DEW.

(Supreme Court, Appellate Division, First Department, New York, 1905. 102 App. Div. 529, 92 N. Y. Supp. 891.)

This action was brought to recover upon a promissory note given by the defendant to the plaintiffs' testator. The note was dated November 23, 1901, whereby the defendant promised to pay to the order of Oliver W. Buckingham, the testator, one year after date, the sum of $5,000, with interest at 6 per cent. Oliver W. Buckingham died testate on the 31st day of October, 1903, and upon the probate of his will the plaintiffs duly qualified as his executors. The answer averred, for separate and affirmative defenses, that the testator had canceled the said note by an instrument in writing. Upon the trial of this action the plaintiffs proved the making of the note, the nonpayment of which was admitted, except as stated in the answer, and rested. The defendant then offered proof that after testator's death the note in question was found among his papers, inclosed in an envelope together with

the following paper, all in the handwriting of the testator, except the signature of the witness:

"New York, Nov. 25, 1901.

"To My Executors—Gentlemen: The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders.

"Truly yours, Oliver W. Buckingham.

"Witness: Frank W. Woglom."

Judgment for plaintiffs. Defendant appeals.[8]

HATCH, J. * * * This brings us to the main question in the case—the construction of the written declaration of the testator, which was found in the envelope which contained the note after his death. It is probably true that this declaration was sufficient to discharge defendant's obligation upon the promissory note, within the authority of Wekett v. Raby, 2 Brown's House of Lords Rep. 386. The declaration therein was made a few days before the death of the testator, in these words: "I have Raby's bond, which I keep. I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he shall not be asked or troubled for it."

Suit having been brought upon the bond, it was ordered to be delivered up and canceled, and such decision was affirmed by the House of Lords upon appeal. The declaration in the present case is, in one view, stronger than the declaration in that case, for therein there was the express intention of the testator to keep the bond as a subsisting obligation against Raby, and it was not to be enforced save in the event of his death, when it was to take effect. In the writing under consideration in this case there is no such expression in terms. A similar doctrine was announced in Brinckerhoff v. Lawrence, 2 Sandf. Ch. 412. Therein the Raby Case is cited with approval. The declaration therein was, like the present, limited in its operative force to events which might happen subsequently to the death of the declarant. These cases applied the common-law rule, and, while they are authoritative declarations of the effect of this instrument at common law, they are not controlling in its construction at the present time, for the reason that the force and effect of an instrument of renunciation is now governed by the provisions of section 203 of the negotiable instruments law (Laws 1897, p. 744, c. 612). It reads: "The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon."

[8] The statement is abridged, and part of the opinion omitted.

This statute was taken from an act passed by the British Parliament in 1882, known as the "Bills of Exchange Act." It has been quite generally adopted in various states of the American Union. Its provisions are as follows: "(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. (2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

It is readily seen that these two statutes, in character and import, are alike. The only difference is change in the form of phraseology, but it affects neither the sense nor the construction. A single case has arisen in England under the provisions of this statute. In re George, L. R. 44 Ch. Div. 627, decided in 1890. Therein it appeared that the testator desired to have destroyed a note for £2,000. given by Mrs. Francis. Search was made for the same, that it might be destroyed, but it could not be found. At the instance of the decedent, the nurse in attendance upon him wrote at his dictation: "30th August, 1889. It is by Mr. George's dying wish that the check [sic] for £2,000. money lent to Mrs. Francis be destroyed as soon as found." The nurse added to this declaration the words: "Mr. George is perfectly conscious and in his sound mind. [Signed] Nurse T." This transaction took place two or three hours before death. The testator therein left a will, in which he bequeathed to Mrs. Francis, his niece, the sum of £6,000. The executors of the will declined to pay the bequest in full, and thereupon the legatee brought an action to determine the question as to whether the promissory note had been duly canceled. The court, under the provisions of the statute above quoted, determined that the renunciation was insufficient to discharge the note. Upon the case there presented, I should be disposed to hold that it amounted, within the terms of the act, to an unconditional renunciation of the rights of the testator against the maker of the note. The expression that it was the testator's wish that it be destroyed would seem to constitute an announced declaration to destroy the instrument, and, as such, it was a clear expression of a renunciation of his right to enforce it. In the declaration of renunciation, it is stronger than the instrument relied upon in the present case.

There is some obscurity in the provisions of our statute. In its first sentence it provides for the renunciation of the rights of the holder against any party to the instrument which may be made before, at, or after its maturity. In the second sentence it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at or after the maturity of the instrument, and discharges the instrument. The first relates to the party; the second, to the instrument. It is somewhat difficult to see how there could be an

absolute discharge of a party to an instrument without discharging the instrument as an obligation, so far as he is concerned. We do not clearly perceive why this distinction should have been made. It is immaterial, however, to the rights of the parties to the present action. The instrument of renunciation contains no express declaration of the testator to renounce his rights in the note against the party, or of his right to enforce it as a subsisting obligation. The expression is: "I wish [the note] to be canceled in case of my death." There is nothing in these words which can be construed as expressing a renunciation of any rights either against the party or upon the instrument. Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note. There is nothing indicating an intent upon his part not to enforce it during his lifetime. There was no delivery of it to anybody, and while, doubtless, it was sufficiently authenticated to accomplish a renunciation, it had no operative effect whatever, as it did not fall within the statute or comply with its terms.

In principle, the question raised by this case has been decided by this court. Dimon v. Keery, 54 App. Div. 318, 66 N. Y. Supp. 817. Therein the plaintiff's intestate loaned to the defendant a sum of money, taking her promissory note in writing, wherein she agreed to pay the same, with interest, on demand. At the time the note was delivered, the testator indorsed thereon the words: "At my death the above note becomes null and void. Stephen C. Dimon." Dimon continued to retain possession of the note, and the defendant paid interest thereon, but no principal. Dimon died about three years after the execution and delivery of the note. In an action to enforce the same by his administrator, the defendant was held liable thereon, as the indorsement was a mere declaration by the payee of the note as to his intention concerning it, but that it was insufficient as constituting either a gift of money, or an agreement to discharge it as an obligation. The court therein did not discuss the statute which is here the subject of consideration. It is manifest, however, that the declaration indorsed upon the note was not a renunciation of the liability of the maker during the lifetime of the deceased, or of any renunciation of the obligation of the instrument; and, as it did not constitute a gift or an agreement, it neither fell within the terms of the statute, nor exempted the defendant, for either reason, from liability thereon.

In the instrument relied upon in this case, so far as the direction for cancellation in the event of death, and a command to his heirs to obey his wish and follow his orders, the language is no stronger than the indorsement upon the back of the note in the Dimon Case. Nor is it as strong, because the language there used was a declaration that the note at death "becomes null and void." Here there is simply the expression of a wish to have it canceled, and a direction to the heirs to obey the wish. Consequently the Dimon Case becomes a direct and controlling

authority in the disposition of this controversy. As there was no valid renunciation of right of the testator to enforce the note against the party, or of renunciation from liability upon the instrument, and as nothing contained in the declaration otherwise operates to relieve the defendant from liability, it follows that the note remains a valid and subsisting obligation.

The judgment enforcing it should therefore be affirmed, with costs.[9]

BOYLSTON v. GREENE.

(Supreme Judicial Court of Massachusetts, Suffolk, 1812. 8 Mass. 465.)

Assumpsit, in which the plaintiff declares as indorsee against the defendant as indorser of a promissory note made by one John R. Greene, dated April 21, 1807, payable to the defendant, by him indorsed to one Thomas Lathrop, and by him to the plaintiff, being payable in 60 days from date with grace at the Norwich Bank.

On the trial of the action upon the general issue before Parker, J., it appeared that the said Lathrop had procured the note, soon after its date, to be discounted at the Norwich bank, and had received therefrom the sum therein expressed; that at the expiration of the 60 days and grace, neither the said John R. Greene nor the defendant having paid the same, the said Lathrop paid the said note at the said bank, and, having taken it up, afterwards indorsed it to the plaintiff.

The judge directed the jury that, after Lathrop had thus paid and taken up the note, it ceased to be negotiable, and therefore that the plaintiff could not recover. And the jury having returned a verdict for the defendant, the plaintiff moved for a new trial, for the misdirection of the judge.[10]

PER CURIAM. The question in this case is whether the note declared on continued to be capable of negotiation after it had been paid by Lathrop, the last indorser. In such case there would be no inconvenience in considering the note still negotiable, having been paid by the last indorser, for he has a full and complete right upon the note against the maker and all prior indorsers, and their situation would not be made worse in any respect by their obligation being transferred to another.

But we find the rule laid down generally that, by payment of a bill or promissory note, the contract of the parties to it ceases, so far as to prevent their being subject to new engagements, and an indorsement cannot be made after it, so as to affect any of the parties, except the person making it.

[9] Compare Faneuil Hall Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. Rep. 416 (1903), and Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724 (1906). See Edwards v. Walters, [1896] 2 Ch. 157 (C. A.)

[10] Arguments of counsel are omitted.

The whole effect, however, of this rule, is to make a difference in the form of action, as it respects the nominal parties. The maker and prior indorser are still liable on their respective engagements; and the plaintiff, having a bona fide transfer of the note from Lathrop, may maintain an action in Lathrop's name against either of them; and the court will see that no interference of the nominal plaintiff shall prevent a recovery.

Judgment on the verdict.[11]

PRICE v. SHARP.

(Supreme Court of North Carolina, 1842. 24 N. C. 417.)

RUFFIN, C. J.[12] This is an action of assumpsit on two bills of exchange by the plaintiff as an indorser of Peebles, Hall & Co. against the acceptor. The bills were drawn on the 10th of July, 1841, by Peebles, Hall & Co., of Petersburg, in Virginia, in favor of F. E. Rives, on the defendant Sharp, of Danville, in Virginia, who accepted them, but failed to pay them when they fell due. The one was for $783.85 at 90 days, and the other for $787.71 at 4 months, from date. Upon the failure of Sharp, the payee, Rives, returned the bills to the drawers, Peebles, Hall & Co., for payment; and they accordingly paid him and took up the bills. On the 10th of December, 1841, Peebles, Hall & Co. indorsed the bills to the present plaintiff, who resides in Caswell, in this state, and immediately commenced this action by original attachment, levied on the estate of the defendant, situate in Caswell. The indorsement from Peebles, Hall & Co. to the plaintiff was without consideration, and was made for the purpose of enabling Price to take out an attachment in his name for the benefit of Peebles, Hall & Co., and the present action was accordingly brought for their use. Upon the return of the attachment the defendant gave bail, and appeared and pleaded, first, non assumpsit, and, secondly, by way of special plea in bar, the facts stated respecting the indorsement and the purpose of it. Upon the trial the facts were agreed upon as here stated, and upon them his honor was of opinion for the plaintiff, and so instructed the jury, who found a verdict accordingly, and from the judgment the defendant appealed.

For the defendant it has been insisted that the plaintiff cannot maintain this action, commenced by original attachment, because it is not brought for his own benefit, but, in evasion and fraud of the act of 1777, for that of Peebles, Hall & Co., who could not have brought it in their own names, according to the case of Broghill v. Wellborn, 15 N. C. 511. Whether this objection be valid or not, if taken in apt time, it is not now necessary to say; for, if good, it comes too late. Un-

11 Overruled in Guild v. Eager, 17 Mass. 615 (1822).

12 The statement of facts is omitted.

doubtedly the holder of a bill may indorse it to another in trust for himself, or to collect as his agent, and the indorsee may have an action against the acceptor of the bill. The objection is not, therefore, that this plaintiff could not maintain assumpsit on these bills, but that he cannot commence that action by attachment, but should have done it by capias. The imputed defect lies in the writ, and the answer is obvious that, by accepting the declaration and pleading to it, the party waives all defects in the process. This point should have been raised by a plea in abatement or in some other method before pleading in bar.

But in the opinion of the court there is another objection to the plaintiff's recovery, which has more force. It is that the bills could not be put into circulation by the indorsement of Peebles, Hall & Co., after those persons had paid them to Rives. If Rives' name had been put on the bills, the case of Beck v. Robley, 1 H. Black. 89, is a direct authority against this action. In that case a bill was drawn by Brown on Robley, payable to Hodgson or order. Hodgson put his name on the bill; and, not being paid when due, Hodgson, without striking out his blank indorsement, returned the bill to Brown, and he took it up, and afterwards passed it to Beck, who brought the action. It was held that when the bill came back unpaid, and was taken up from the payee by the drawer, it ceased to be a bill, for it could not then be negotiated by him without making Hodgson liable thereon, for which there was no color. Between that case and the present there is but one point of difference; and that but increases the difficulties in the plaintiff's way. Hodgson's name was remaining on the bill when he returned it to Brown; whereas it does not appear that Rives ever put his name on these bills, and it cannot be assumed that he did. But waiving that for the present, the case cited is conclusive for the defendant, even if Rives' indorsement were on the bills.

The counsel for the plaintiff, however, opposes to that case the more recent one of Callow v. Lawrence, 3 Maule & Selwyn, 95, and the language there used by Lord Ellenborough: "That a bill of exchange is negotiable ad infinitum, until it has been paid by, or discharged in behalf of, the acceptor; and that, if the drawer has paid the bill, it seems he may sue the acceptor on the bill, and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties, who may have indorsed the bill, that the holder should be at liberty to sue the acceptor." But it seems to us that neither the case itself, nor the doctrine here quoted, when correctly understood, shakes the principle of Beck v. Robley, but rather sustains it. No one can deny that a bill is negotiable indefinitely until payment. But the question is, by whom may it be negotiated? Why, by the payee, or by any person entitled under his indorsement; and the acceptor will be as much bound to pay it to such indorsee, however remote, as he was to the payee himself, before he indorsed it. But it does not follow that the drawer of the bill, who takes it up, after dishonor, from the payee, is to be considered the indorsee of the

payee. Far from it; for, instead of claiming from the payee or under him, he was, in truth, liable on it to the payee, in default of the acceptor, and in discharge of the liability took it up. Then he could not look to the payee to make the bill good to him; and, by consequence, he could not by his subsequent indorsement give to his indorser the right to such recourse against the payee. But as that would be the necessary effect of such indorsement, if allowed at all, it resulted that in such a case the law would not allow the drawer again to put his bills into circulation. That the payee suffered his name to remain on the bill, when he returned it, will not be an authority to the drawer to negotiate it; for it was not left there to give credit to the bill with the drawer, or, in other words, as an indorsement, but merely as a receipt for the amount paid by the drawer, animo solvendi. After such payment it would be unjust to the payee to allow the drawer to pass the bill on the responsibility of the former; and, therefore, he is not permitted to pass it at all. With this reasoning, the passage quoted from Lord Ellenborough consists.

In Callow v. Lawrence the bill was not, as here and in Beck v. Robley, payable to the third person, but was payable to the drawer's order. After acceptance the drawer indorsed it, and it went through several hands, and was finally returned to the drawer by the holder, who struck out all indorsements after that of the drawer, and received payment from him, and then the drawer passed the bill to Callow; and it was held that the latter might maintain his action against the acceptor. A bill payable to the drawer's order, when accepted, becomes substantially a promissory note from the acceptor to the drawer, being an express promise to pay the drawer or his assigns. When it comes back to the drawer, he is remitted to his original rights upon an instrument payable to himself, and may sue on it, without noticing indorsements that had been made of it. Dook v. Caswell, 2 N. C. 18; Strong v. Spear, 2 N. C. 214; Callow v. Lawrence, 3 M. & S. 95. It would seem to follow necessarily that the drawer might again indorse it; for in so doing he passes the instrument regularly according to its face, and leaves no one liable to his indorsee but himself and the acceptor, each of whom ought thus to be liable. Gomez Serra v. Berkeley, 1 Wils. 46; Guild v. Eager, 17 Mass. 615.

Upon this distinction between bills payable to a third person, on the one hand, and a promissory note or bill payable to the drawer's order, on the other, are obviously founded the observations of Lord Ellenborough in the case cited. He admits the authority of Beck v. Robley, and carefully confines his rule to the case then before him, that is to say, of a bill payable to the drawer's order, by saying "that if, instead of suing the acceptor, he (the drawer) put the bill into circulation upon his own indorsement only, the holder might sue the acceptor," which can apply to no case but that of a bill payable to the drawer's order or a promissory note. Then he immediately proceeds to declare further that "the case would be different, if the circulation of the bill would

have the effect of prejudicing any of the indorsers," as in Beck v. Robley was the case. The other judges place the matter in a still clearer light. Le Blanc, J., said: "There was in Beck v. Robley no color to charge Hodgson, and, striking out Hodgson's indorsement, the bill could not possibly be negotiable." And Bayley, J., who is high authority upon a point of this kind, states the distinction very shortly and happily by saying that "in Beck v. Robley payment by Brown struck out the indorsement of Hodgson, whereas the payment by Pywell (the drawer in Callow v. Lawrence) did not, in legal effect, strike out Pywell's own indorsement, so as to render the bill no longer negotiable." Thus those two cases stand well together. The principle of Beck v. Robley is that which governs this case, and is that a person cannot negotiate paper, when by so doing he would render responsible on it another person, from whom he had taken it up, under a prior responsibility; while the principle of Callow v. Lawrence is that a person who takes up paper once due to himself may again put it into circulation, provided that, in so doing, he exposes no person to a prejudice but himself or those who are legally and justly liable on the paper before him.

In considering the case hitherto, it has been treated as if Rives had put his name on the bills, in which case, even, we have seen that the law is against the plaintiff. But that fact is otherwise here, or, at least, does not appear, which is the same thing. In Beck v. Robley the plaintiff no doubt did sue as the indorsee of Hodgson, the payee, so that he had apparently a regular title to the bill. But this plaintiff declares, not as the indorsee of Rives, but upon the indorsement of Peebles, Hall & Co., which is certainly bad. No person can acquire a title to a bill, payable to the order of Rives, but by the order of Rives. When he gave it back to Peebles, Hall & Co., without his indorsement, it was dead to all intents and purposes as a negotiable instrument. In the words of Mr. Justice Le Blanc, "Striking out the payee's indorsement, the bill could not possibly be negotiated." The indorsement to the plaintiff was a nullity, and he cannot maintain any action on the bills.

New trial awarded.

BLENN v. LYFORD.

(Supreme Judicial Court of Maine, 1879. 70 Me. 149.)

Assumpsit by indorsee against the maker of a promissory note.

After the note was read in evidence, the defendant offered the receipt following, signed by M. E. Rice, the payee, which was excluded: "Received of H. H. Lyford two notes of hand, dated in December last, for three hundred dollars each, one payable in six months from date, the other seven months from date. These notes are for my benefit, except for his note due me April 15, 1872, for $225. The balance of the two above-named $300 notes I am to pay."

Joseph H. Richardson, called by the defendant, testified in substance that he bought the note in suit of M. E. Rice in the fore part of April, 1872; that it had about four months to run; that it then had on the back the words, "Holden without demand or notice, M. E. Rice," now erased; that he kept it two or three months after it became due. On being asked whether M. E. Rice then paid it and took it up, the answer, on objection of the plaintiff, was excluded.

Various other questions to similar purports, and other testimony tending to show equitable defenses, was excluded on objection.

By consent of parties, the case was withdrawn from the jury and reported to the law court. If the foregoing rulings were wrong, and if the evidence excluded was admissible and would constitute a valid defense against this plaintiff, the case is to stand for trial; if inadmissible, or insufficient to constitute such defense, a default is to be entered for the amount of the note, with interest since due.

The remaining material facts sufficiently appear in the opinion.[13]

Appleton, C. J. This is an action of assumpsit on the following note: "St. Albans, Me., Dec. 2, 1871.

"Seven months from date, value received, I promise to pay M. E. Rice, or order, three hundred dollars, at any bank in Bangor.

"H. H. Lyford."

The note was indorsed in blank: "M. E. Rice." The following words were also on the back of the note, erased with ink, but legible: "Holden without demand or notice. M. E. Rice."

Granting the presumption that the plaintiff is a bona fide holder for value of the note before maturity, that presumption may be overcome by proof.

It appears from the testimony that the note was indorsed to one Richardson, for value, in the April following its date, that it was not paid at maturity, and that about three months after its dishonor he delivered it to Rice, the payee.

The plaintiff then received the note in suit, when overdue. The note, remaining unpaid after maturity, was dishonored, and it was the duty of the indorsee to make inquiries concerning it. If he takes it, though he gave a full consideration for it, he does so on the credit of the indorser. He holds the note subject to all equities with which it may be incumbered.

As the plaintiff is the indorsee of a dishonored note, it was competent for the defendant to show that it was an accommodation note, and that it had been paid by the party for whose accommodation it was given.

That the note was for the accommodation of the payee is abundantly shown by his receipt of the date of February 22, 1872, as well as by the testimony offered and excluded.

The note being for the accommodation of Rice, it was his duty to

[13] The arguments of counsel are omitted.

pay it. The note being found after dishonor in the hands of the one bound to pay it, the presumption is that he paid it. 2 Par. N. & B. 220. It was competent to show that in fact he paid it, but the answer to an inquiry whether the note was paid by Rice was excluded. This was erroneous.

Assuming the note to have been paid by Rice, it was the same as if paid by the maker. It was paid by the party whose duty it was to pay it. The purpose for which it was given has been accomplished. The negotiability of a note ceases after its payment by the party who should rightfully pay it. "Now it cannot be denied," says Denman, C. J., in Lazarus v. Cowie, 43 E. C. L. 819, "that if a bill be paid when due by the person ultimately liable on it, it has done its work, and is no longer a negotiable instrument. * * * But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value. He is the person ultimately liable, and his payment discharges the bill altogether."

Rice, when he took up the note in suit, had no right of action against the maker, and could not transfer to the plaintiff any better right after maturity than he had. Edw. B. & N. 564; Fish v. French, 15 Gray (Mass.) 520; Tucker v. Smith, 4 Me. 415.

In the cases cited by the plaintiff there are most important differences from the one under consideration. In Bank v. Crow, 60 N. Y. 85, the plaintiffs were the indorsees of the note for value and before maturity, and were consequently to be protected. In Thompson v. Shepherd, 12 Metc. (Mass.) 311, 46 Am. Dec. 676, it was held that the indorsee of a note, who receives it for value from the second indorser, after it has been dishonored by the maker, can recover thereon against the maker, although he knew when he received it that as between the maker and first indorser it was an accommodation note. But this is upon the principle affirmed by the court in Woodman v. Churchill, 52 Me. 58, that where the first indorsee of a promissory note acquires a right of action against the maker, by being a bona fide purchaser, without notice and before maturity, he can transfer a good title as well after as before the note becomes due.

Exceptions sustained.

MADISON SQUARE BANK v. PIERCE.

(Court of Appeals of New York, 1893. 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. Rep. 751.)

This was an action upon a promissory note. The facts, so far as material, are stated in the opinion.

FINCH, J. We have a novel and interesting question before us on this appeal, although its apparent importance will lessen as we pass from first impressions to some slower reflection. It arises upon facts which are very brief and simple, and may at once be stated. The de-

fendant, Pierce, made his promissory note payable to his own order, and indorsed it to the Bates Company, Limited, which indorsed it to the plaintiff bank; the latter discounting it, and paying the proceeds over to the immediate indorser. Thereafter the Bates Company became insolvent, and passed into the hands of a receiver, who paid to the bank upon the liability of the indorser 73¼ per cent. of the amount secured by the note. Later the bank sued Pierce, the maker, and recovered judgment for the full amount of the note, in spite of the proof showing the payment made by the receiver, and in disregard of the claim asserted by the defendant that he should only be held liable for the balance remaining unpaid. That judgment has been affirmed by the general term, Judges Daniels and Barrett each writing very strong and valuable opinions in support of their doctrine, and relying upon the authority of Jones v. Broadhurst, 9 Man. G. & S. 177, 67 E. C. L. 175, which fully warrants their conclusion. The question does not seem ever before to have arisen in this country, and we are left at liberty to examine the English rule, and to follow it or not, as we approve or disapprove its logic and its consequences.

We are not to regard the note as being accommodation paper, but must assume its transfer for value. The form of the transaction is equivalent to what it would have been if the Bates Company had been named as payee, and loses none of its force by the intervention of the maker as first indorser. That indorsement, in the form adopted, was needed for the regular transfer of title, but does not change or affect the nature and character of the maker's liability. He remains the ultimate debtor, the person who ought to pay the debt, in preference to and in exoneration of all the other parties to the paper, who in some form or other are entitled to have final recourse to him; and it is to the case of such a maker of the note or such an acceptor of the bill of exchange that the English rule alone applies, and it is explicitly declared inapplicable where the indorser or drawer is the real debtor, although in form only secondarily liable.

Pierce, therefore, was the ultimate debtor, and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser. When the bank sued on the note, it was the legal holder and the legal party in interest. Upon production of the paper and the usual proof, judgment against the maker for the full amount was inevitable, unless some defense should be interposed. The only possible one for Pierce was part payment, and he was compelled to assert, and his counsel are compelled to argue, that the money paid by the indorser to the holder inured to the benefit of the maker as a payment on his debt. But that doctrine cannot prevail, for very obvious reasons. The indorser's payment did not in the least lessen or satisfy the maker's debt. He owed it all exactly as before. What had happened possibly changed somewhat the real creditor, but left the whole debt due and unpaid. To whom he should pay might become a new question, but how much he should pay in

discharge of the note was not made doubtful in any degree. What the receiver advanced to the holder is familiarly described as a payment; but it was such relatively to the indorser's liability alone, while relatively to the obligation of the maker it was an equitable purchase, instead of a payment. That view of it was taken in a very early case, the decision of which depended necessarily upon it.

In Callow v. Lawrence, 3 Maule & S. 95, it appeared that one Pywell drew a bill upon Lawrence to his own order, which Lawrence accepted. The drawer indorsed the bill to Taylor, who discounted it, and thereafter indorsed it to Barnett. It was protested for nonpayment. The drawer paid Barnett the full amount, and took the bill, and, striking off the indorsements of Taylor and Barnett, transferred the bill to Callow, who sued the acceptor upon it. The latter claimed that the bill was paid and extinguished, which the court denied, saying that the drawer "became the purchaser of the bill" when he paid and took it up out of Barnett's hands; that it was not paid by the drawer animo solvendi, in order to extinguish it, but only to redeem himself from the situation in which he stood. That must always be true of payment by indorser to holder, where the maker is the ultimate debtor. To the extent of the money paid the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes pro tanto the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership.

In the present case there was no privity between maker and indorser as respects the action of the latter. He paid, not as the agent of the maker, not at his request, not for his benefit, and under no duty to relieve him, but independently, upon his own obligation, to lessen his own responsibility, and not at all to discharge the ultimate debt which it was the maker's duty to pay. It seems very clear, therefore, that the maker cannot utilize for his own benefit a payment which, as to him, is not a payment upon the debt. It becomes, as I have said, merely a question to whom he shall pay, and who may sue for and collect the whole unpaid sum. In that question the maker has no concern beyond the inquiry whether he may become liable to different persons for the same debt, and encounter the danger of paying it twice. I can discover no such peril. The judgment in favor of the holder is a bar to any other suit on the same note, and payment to the holder discharges the note utterly. Ordinarily, the indorser cannot recover except upon the note, and as holder, and in accordance with the law merchant. If he ever has any other right of action against the maker, it is either in equity or by force of some facts beyond the

bare relation established by the paper. And where the note is merged in the holder's judgment, or paid in full to him by the maker, the indorser's only right is through the judgment or against the proceeds, if he has made a partial payment to the holder. That does the indorser no wrong. If he is not content that the holder shall collect to some extent as his trustee, he may prevent it by payment in full to the holder, and so entitle himself to the possession of the note on which to sue, or, if judgment has been obtained, to be subrogated to all of the rights of the plaintiff therein.

I think this result is clearly indicated by our own decisions. In Mechanics' Bank v. Hazard, 13 Johns. 353, the maker of the note had been arrested in an action upon it, and his bail sought to relieve themselves by force of a payment made by the indorser to the holder; but such effect was denied to it; the court saying that it was not a payment by or on behalf of the maker, or of which he or his bail could avail themselves. And in Guernsey v. Burns, 25 Wend. 411, where the suit was by the holder, representing the legal title and interest, it was said to be no defense to the maker, and no concern of his, that some property in the note was in another.

It thus becomes apparent that there is no very great importance in the question which method of securing payment from the maker is adopted, since the same result follows from each, and that it narrows down to the inquiry whether, as matter of correct doctrine and of convenience in practice, the holder may recover the whole debt against maker or acceptor for himself and as trustee for the indorser to the extent of his acquired interest; or whether he shall take judgment only for the balance, leaving the indorser to sue in some way and on some theory, which apparently could not be upon the note, because already merged in the judgment, but might be for money paid for the use of the maker, since he gets the benefit of it in the reduction of the judgment, as was held in Pownal v. Ferrand, 6 Barn. & C. 439, where the holder deducted the indorser's payment from the levy against the maker. The former seems to me to be the logical and convenient method, and so I think we should follow the English doctrine.

I have not underrated the assault made upon it by the appellant. He asserts that Jones v. Broadhurst is contrary to the earlier cases, and has been criticised and shaken by the later ones. I have examined them all, with some wonder at the amount of learning and ingenuity expended upon the subject. Pierson v. Dunlop, Cowp. 571; Walwyn v. St. Quintin, 1 Bos. & P. 652; Bacon v. Searles, 1 H. Bl. 88; Hemming v. Brook, 1 Car. & M. 57; Randall v. Moon, 12 C. B. 261; Cook v. Lister, 13 C. B. (N. S.) 543; Solomon v. Davis, 1 Cababe & E. 83; Thornton v. Maynard, L. R. 10 C. P. 695. The prior cases were very fully and carefully reviewed by Baron Cresswell in the opinion rendered in Jones v. Broadhurst, and of the subsequent cases I deem it only necessary to say that, along with some criticism and

occasional doubt, the doctrine has remained substantially unshaken, and the case last cited was declared by Lord Coleridge to be the accepted law.

It must not be forgotten, however, and I may prudently repeat, that the doctrine has no application to accommodation paper, and rests wholly upon the actual and ultimate indebtedness of maker or acceptor as the party who ought to pay. In such a case as that, which correctly describes the one now before us, and where no disturbing facts affect the relations of the parties as fixed by the paper itself, I think the holder may sue and recover the full amount, receiving so much of the proceeds as represents a part payment by the indorser as trustee for him.

It follows that the judgment should be affirmed, with costs. All concur, except MAYNARD, J., dissenting.

Judgment affirmed.[14]

QUIMBY v. VARNUM.

(Supreme Judicial Court of Massachusetts, Suffolk, 1906. 190 Mass. 211, 76 N. E. 671.)

Contract on two promissory notes made by John M. Varnum, the defendant, payable to the order of John H. Hurley, attorney, one for $250, dated October 10, 1898, payable 12 months after date, and the other for $200, dated April 10, 1899, and payable on May 1, 1899. Writ dated June 27, 1904.

The answer, among other defenses, alleged payment. At the trial in the superior court before Hardy, J., without a jury, the following facts appeared:

Both of the notes sued on were signed on the back in blank by Benjamin Varnum Howe after they had been signed by the defendant and then were delivered by the defendant to Hurley, the payee.

At the maturity of each note Hurley notified Howe that the notes were not paid and that he should look to him for payment. Howe thereupon paid the amount due on the notes to Hurley, whereupon Hurley struck his own indorsement off the notes, by drawing a line through his name, and handed the notes to Howe.

Howe retained the notes in his possession until April or May, 1904, when he negotiated them to the plaintiff, to whom he owed money at that time. The notes were to be applied on Howe's account with the plaintiff. No money ever was received on the notes by Howe from the defendant.

[14] Accord: Twelfth Ward Bank v. Brooks, 63 App. Div. 220, 71 N. Y. Supp. 388 (1901); Polhemus v. Realty Co., 74 N. J. Law, 570, 67 Atl. 303 (1907). But see Royal Bank v. Goldschmidt, 51 Misc. Rep. 622, 101 N. Y. Supp. 101 (1906).

The defendant requested the judge to rule that the plaintiff could not recover, because Howe, having indorsed the notes before delivery, was an original promisor and comaker with the defendant, and not an indorser, and that the plaintiff, having received the notes after maturity and after they had been paid by Howe, the comaker, could not maintain an action thereon; that the co-maker, Howe, having paid the notes to Hurley, the payee, at their maturity, the notes became extinguished, and would not support the present action based solely on the notes; that each note was a promise to pay John H. Hurley, attorney, and that neither of the notes offered in evidence bore the indorsement of John H. Hurley, attorney, and therefore the action on the notes could not be maintained; and that on all the evidence the plaintiff was not entitled to recover.

The judge refused to rule as requested, but ruled that each note was a promise to pay to the order of John H. Hurley, attorney, and that neither of the notes offered in evidence bore the indorsement of John H. Hurley, attorney, and further ruled, at the request of the plaintiff, that Howe, by placing his signature on the notes in suit in blank before delivery, became secondarily liable to the payee, that payment of the notes sued on by the indorser, Benjamin Varnum Howe, did not discharge or extinguish the notes, that upon paying the face of the notes to the payee Howe was entitled to the possession of the notes and vested with the right to recover the amount from the maker, that after paying the amount of the notes sued on and receiving possession of them he was entitled to negotiate them, that the plaintiff upon receiving the notes from Howe succeeded to all the rights against the maker which Howe had, that where an instrument is negotiated back to a prior party that party may reissue and further negotiate the same, and that the holder of a negotiable instrument may sue thereon in his own name.

The judge found for the plaintiff in the sum of $590.53, and the defendant alleged exceptions.

HAMMOND, J. The note of October 10, 1898, was given before St. 1898, p. 492, c. 533 (now embodied in Rev. Laws, c. 73), took effect; and, of course, the rights of the parties, so far as respects that note, are to be determined by the law of this commonwealth as it was before the statute. By that law Howe, although entitled to notice of the dishonor of the note the same as an indorser, was, nevertheless, a co-maker and joint promisor, and the payment of the note by him extinguished it; and he could not thereafter put it in circulation as against his co-promisor, although in a proper action he could recover of him the amount paid, if, as between the two, it was the duty of the latter to pay the note. Pray v. Maine, 7 Cush. 253, and cases cited. Brooks v. Stackpole, 168 Mass. 537, 47 N. E. 419; National Bank of Republic v. Delano, 185 Mass. 424, 70 N. E. 444.

The same doctrine is applicable to the note of April 10, 1899, which

was made after the statute above named took effect, unless there is something in that statute to the contrary. The plaintiff contends that there is something there to the contrary. He contends that, under Rev. Laws, c. 73, §§ 80, 81, the rights and liabilities of Howe were those of an indorser, and therefore he was only secondarily liable, and that by section 138 the payment of the note by Howe did not extinguish it, but he was remitted to his former rights on the note, and under that section and section 67 might reissue it.

But we cannot adopt this interpretation of the statute. It is manifest that the precise case in hand, so far as respects the original signature of Howe, is described in section 81 of the statute in the following words: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser: * * * (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties." This section accurately defines the liability of Howe upon this note. And in a sense this liability may be said to be secondary.

Section 138 provides that, "where an instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument," with some exceptions not here material. It is plain that this section cannot apply to a case like the one before us. First, what kind of note would this have been if Howe had done what the statute suggests? Let him strike out his own and all subsequent indorsements. Subsequent indorsements must be held to mean subsequent in point of liability. He must therefore strike out, not only his own indorsement, but also that of the payee. Having done what the statute says, he has a note signed by Varnum payable to the order of Hurley, but without Hurley's indorsement, and, further, without any right to Hurley's indorsement. Is such a note negotiable? In the case at bar the note sued on did not bear the indorsement of the payee, Hurley having struck out his own indorsement before he handed the note to Howe.

Again, the statute says that the party secondarily liable is remitted to his former rights as regards all former parties. But the only prior party Howe could look to is the maker, for he stands next to the maker in the order of liability, but, as against him, Howe never had any claim on the note as such, and it never was intended that he should have. If this note never had been delivered to Hurley, but had been handed to Howe in the first instance by Varnum, could Howe have negotiated it without the indorsement of the payee? And, when he has paid it and is remitted to his former rights, does he get any other right than he had before? The section is clearly inapplicable to such a state of things. It is intended to apply where the person secondarily liable can trace his title on the face of the note and its indorsements through the

prior parties to the party whom he seeks to hold. This Howe could not do, nor can the plaintiff. Having paid the note, Howe had an action against Varnum to recover, but the action was not upon the note.

It follows that the plaintiff cannot recover on either note.

Exceptions sustained.

SECTION 2.—CANCELLATION

RAPER et al. v. BIRKBECK et al.

(Court of King's Bench, 1812. 15 East, 17.)

This was an action brought on a bill of exchange for £534. 18s. drawn by one Crossley on Samuel Shawe & Co., and accepted by them, at Messrs. Ladbrooke's and Co., London, payable six months after date. The declaration, after stating several indorsements over to the defendants, alleged an indorsement by them to the plaintiffs by name, and then averred in the usual way the presentment of the bill for payment at Ladbrooke's, and their refusal to pay it. At the trial, before Lord Ellenborough, C. J., in London, after last Trinity term, it appeared that the defendants, who were bankers in Yorkshire, paid the bill in question, with others, to the plaintiffs, who were likewise bankers there; and it was then in a perfect state, with the several indorsements and acceptance on it. When the bill became due, on the 21st of January, 1811, being then in the hands of Down & Co., their clerk carried it to the general clearing house of the bankers in London, and received it back from Ladbrooke's clerk as a dishonored bill, with the words "no account" written thereon. But as there was also written at the back of it, "in case of need apply to Boldero & Co." the bill was sent to Boldero's house in the course of the clearing hours, where H. Boldero, one of the partners, upon receiving the bill from his clerk, intending to allow it in account with Down & Co. drew his pen through the acceptance, and canceled it by mistake, thinking it had been an acceptance payable at their house; but the bill had not then been allowed in the clearing house, nor taken down in the clearing book, and in less than ten minutes from the time of canceling it, the clerk informed him of his mistake, and wrote under the acceptance, "Canceled by mistake," to which H. Boldero subscribed his initials. But nevertheless the bill was taken up by Boldero's house for the honor of the plaintiffs, with whom they had an account, and was never out of their hands afterwards. On the following day, one of the prior indorsers called at Boldero's for the bill in order to pay it; but on finding that the acceptance had been canceled, said that as it appeared canceled, he would not take it up. Upon these facts the jury found a verdict for

the plaintiffs; and in the following term the Attorney General obtained a rule nisi for a new trial, on the ground that the cancellation, in fact, though accidental, threw a difficulty upon the defendants of recovering over against the prior indorsers, as it would be necessary to go through the same media of proof to establish their claim over against such prior indorsers—a difficulty which ought not to be thrown upon them, especially by the act of the then holders of the bill, and which difficulty might be increased by the death of any of the witnesses in the meantime; and therefore, he contended, that this action did not lie.

Garrow and Holroyd now showed cause against the rule, and said that the only pretense there could be for disturbing the verdict was that the effect of this accidental cancellation might be to prevent the defendants from recovering over against the prior indorsers. But their legal remedy upon the bill remains the same as before, however the circumstance may throw more of difficulty in their way, and require some additional proof by way of explanation. This is no more than might happen from any other accident to which a bill of exchange is liable, as if it should be obliterated by a quantity of ink falling upon it, or torn by a child; and yet it cannot be contended that in such case the party would be precluded from his remedy on the bill. It is observable that this cancellation was not only done by mistake, but was done also by a person who had no authority to cancel; for the acceptance was at Ladbrooke's, and not Boldero's acceptance. But wherever an instrument is not made an end of, then if anything be done to it by a person who has no authority to do the act, the act so done will not vitiate it. In Fernandez v. Glynn it was held, where a banker's clerk had canceled a check by mistake, but had afterwards written under it, "Canceled by mistake," that the banker might, notwithstanding, return the check unpaid, for he had not thereby made it his own.

The Attorney General, contra. The objection is not of the plaintiff's own raising, but, as appears by the evidence, has been made by one of the prior indorsers refusing to take the bill up on that very account. The question, then, is whether the defendants, before they are compellable to pay the amount of the bill to the plaintiffs, have not a right to require that they shall be placed in such a situation as to have the usual means furnished them of resorting over against the prior indorsers. If they have such right, it is an answer to this action; for it is clear that the cancellation will impose upon them many difficulties of proof out of the ordinary course. The bill upon the face of it appears to have been paid; and it will be necessary, in order to support any action on it, to go into evidence explanatory of that circumstance. That evidence may be removed out of the reach of the defendants, either by death, or a variety of other accidents. It is said that this is the common chance attending upon all cases; the answer to which in the present case is that the parties themselves, who held the bill at the time, had no right by their own act to impose these diffi-

culties upon others, though if the law had cast them upon the defendants, it might have been different.

Lord ELLENBOROUGH, C. J. I should have felt considerable pressure in the argument used on behalf of the defendants, if the fact had borne them out. Undoubtedly the indorsees, generally speaking, are bound to return the bill to the indorsers in the same plight as they received it, and unchanged by any act of theirs; but I cannot consider the act of Boldero as the act of the indorsees, for he had no authority, either express or implied, from them to do the act, and the whole originated in his mistake. The case then comes to the instances put in argument at the trial, of a blot having fallen upon, or a child having torn or destroyed, the instrument. In such cases the law is not so strict as to require the precise formal proof which is ordinarily required; for that would be at once to preclude the party of his remedy. I remember Pothier (vol. 2, 114, partie 1, c. 3, § 3) in his treatise on Bills of Exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, "Il peut changer de volonté et rayer son acceptation." A fortiori, then, a third person who cancels an acceptance by mistake, having no authority so to do, shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill.

PER CURIAM. Rule discharged.[15]

INGHAM v. PRIMROSE.

(Court of Common Pleas, 1859. 7 C. B. [N. S.] 82.)

This was an action upon a bill of exchange drawn by one Charles Murgatroyd upon and accepted by the defendant, and indorsed by Murgatroyd to one King, and by King to the plaintiff. * * *

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary term, 1858. The facts which appeared in evidence were as follows: The defendant accepted the bill declared on, and gave it to Charles Murgatroyd for the purpose of procuring it to be discounted for his use. Murgatroyd tried, but in vain, to get the bill discounted, and returned it to the defendant, who in Murgatroyd's presence tore the paper in half and threw it away in the street. Murgatroyd picked up the bill, observing that it was better not to throw

[15] Accord: Lyndonville Bank v. Fletcher, 68 Vt. 81, 34 Atl. 38, 54 Am. St. Rep. 874 (1895); Humboldt Bank v. Rossing, 95 Iowa, 1, 63 N. W. 351 (1895); Dominion Bank v. Anderson, 15 Sess. Cas. 408 (1888). See, also, Bank of Scotland v. Bank, [1891] A. C. 592. But a destruction or cancellation not induced by fraud or mistake discharges all parties, or the party whose signature is canceled, both from liability on the instrument (McCormick v. Shea, 50 Misc. Rep. 592, 99 N. Y. Supp. 467 [1906]) and from liability on the consideration given for it (Blade v. Noland, 12 Wend. [N. Y.] 173, 27 Am. Dec. 126 [1834]).

it down in the street; whereupon the defendant said nothing. Murgatroyd afterwards pasted together the two pieces of paper, and passed the bill away to one King, who afterwards indorsed it to the plaintiff.

The jury found that the defendant when he tore the bill in half and threw it away intended to cancel it; that King bona fide gave £15. for the bill; but that the transaction between King and the plaintiff was not bona fide.

The learned judge thereupon directed a verdict to be entered for the defendant, but gave the plaintiff leave to move to enter the verdict for him, the court to be at liberty to draw inferences of fact.

Cross, in Easter term, 1858, accordingly obtained a rule nisi.[16]

Williams, J., now delivered the judgment of the court.

This case was argued before the late Lord Chief Justice, my Brothers Willes and Byles, and myself. We are of opinion that the plaintiff is entitled to judgment. It is, we think, settled law that, if the defendant had drawn a check, and, before he had issued it, he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it been lost or stolen before he delivered it to any one as indorsee. See the judgment in Marston v. Allen, 8 M. & W. 504. The reason is that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud.

If these were all the facts of the case, it appears to be impossible to distinguish it in any material point from the cases already mentioned, of liability when the original circulation has been effected by fraud, without the consent of him who made the instrument.

The question, then, is whether such liability is precluded by the fact that, before the instrument was put into circulation for the second time, the defendant had torn it, with the intention of destroying or annulling it.

If an act done with such an intention by the maker of a negotiable instrument does not manifest the intention on the face of the instru-

[16] The statement is abridged, and the arguments of counsel omitted.

ment, it can hardly be maintained that the act would be of any efficacy; because the instrument would nevertheless be apparently a part of the mercantile currency, as, for instance, if, in the present case, the defendant had merely crumpled up the bill in his hand and thrown it away, and it had been restored to its original appearance, without leaving any trace of the act which was intended to annul it. But if, on the other hand, the act be such that the paper bears on the face of it the signs of something having been done to it which is characteristic of an intention to destroy or annul it, as in the case of Scholey v. Ramsbottom, 2 Campb. 485, where the drawer of a check tore it into four pieces and threw it from him, and the four pieces were afterwards neatly pasted together upon another slip of paper, but the rents were quite visible, and the face of the check soiled and dirty, no holder of an instrument in such a condition could enforce it, because, in truth, no man of ordinary intelligence and caution could fairly regard it as part of the apparent commercial currency.

The case before us, therefore, appears to turn on the question whether the act of tearing the bill into two pieces, being manifest on the face of it, is such an act as prima facie ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation. As we understand the facts, the tearing had been done in such a way that the appearance of the bill when it reached the plaintiff's hands was at least as consistent with its having been divided into two, for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it. It was, properly, a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose. But the point has been so reserved at the trial that the court is to perform the function of the jury in this respect; and we cannot find enough on the facts of the case, or on an inspection of the bill itself, to justify us in coming to such a conclusion.

But it is argued, on the part of the defendant, that the putting together of the two halves under the circumstances amounted to forgery, just as much as if some signature which he had written for a different purpose had been taken from its proper place, and fraudulently attached as his signature to the bill.

This would be a very narrow ground of decision, inasmuch as it would concede that the bill would be enforceable if the tearing had stopped short of utterly dividing the paper, or if the bill had come to the plaintiff's hands in the halves, by two successive posts, with an intimation that it was so sent to him for the purpose of safer transmission.

However, it seems to us that, even assuming that the act of thus reconstructing the bill constituted a forgery (which may admit of grave doubt), yet, on the principle of the decision of Young v. Grote, 4 Bingh. 253, 12 J. B. Moore, 484, this would be no answer to the

claim of the plaintiff, because the defendant, by abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff's becoming the holder of it for value, and without having any just cause for supposing that it had been canceled or annulled.

The rule must therefore be absolute for entering a verdict for the plaintiff for the amount of the bill and interest.[17]

SECTION 3.—ALTERATION

MASTER et al. v. MILLER.

(Court of King's Bench, 1791. 4 Term R. 320.)

The first count in this declaration was in the usual form by the indorsees of a bill of exchange against the acceptor; it stated that Peel & Co. on the 20th of March, 1788, drew a bill for £974. 10s. on the defendant, payable three months after date to Wilkinson & Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts, for money paid, laid out and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated that Peel & Co. on the 26th March, 1788, drew their bill on the defendant, payable 3 months after date to Wilkinson & Cooke, for £974. 10s., "which said bill of exchange, made by the said Peel & Co., as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following, to wit: June 23d. £974. 10s. Manchester, March 26, 1788. Three months after date pay to the order of Messrs. Wilkinson & Cooke, £974. 10s. received, as advised. Peel, Yates & Co. To Mr. Chas. Miller. C. M. 23d June, 1788." That Peel & Co. delivered the said bill to Wilkinson & Cooke, which the defendant afterwards, and before the alteration of the bill hereinafter mentioned, accepted. That Wilkinson & Cooke afterwards indorsed the said bill to the plaintiffs, for a valuable consideration before that time given and paid by them to Wilkinson & Cooke for the same. That the said bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of Wilkinson & Cooke as aforesaid, bore date on the 26th day of March, 1788, the day of making the same.

[17] But see Baxendale v. Bennett, 3 Q. B. D. 525 (1878); Scholfield v. Londesborough, [1896] A. C. 514; National Exchange Bank v. Lester, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402 (1909).

And that after it so came to, and whilst it remained in the hands of, Wilkinson & Cooke, the said date of the said bill, without the authority, or privity, of the defendant, was altered by some person or persons to the jurors aforesaid unknown from the 26th day of March, 1788, to the 20th day of March, 1788. That the words "June 23d," at the top of the bill, were there inserted to mark that it would become due and payable on the 23d of June next after the date; and that the alteration herein before mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange, when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23d of June and also on the 28th of June, 1788, presented to the defendant for payment, on each of which days respectively he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill, upon, which the plaintiffs declared etc.[18]

Grose, J. The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange dated the 20th of March; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March; but the defendant objects to the plaintiffs' recovering on this count also, because, the bill having been altered while it was in the hands of Wilkinson & Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular choses in action to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson & Cooke to them, and that this was the bill which was presented when it became due. Now has all this been proved? The bill was drawn on the 26th of March, payable at 3 months date. The defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date was altered. The date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days. According to that alteration, the payment was demanded on the 23d of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel & Co. and accepted by the defendant; and here the cases, which were cited at the bar, apply.

Piggott's is the leading case; from that I collect that when a deed is erased, whereby it becomes void, the obligor may plead non est

[18] The arguments of counsel and the opinions of Lord Kenyon, C. J., and Ashhurst and Buller, JJ., are omitted.

factum, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and secondly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds; but it is said that that law does not extend to the case of a bill of exchange. Whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void, merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favor it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instruments as to another.

But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal, than in the latter case. Supposing a bill of exchange were drawn for £100. and after acceptance the sum was altered to £1,000. It is not pretended that the acceptor shall be liable to pay the £1,000.; and I say that he cannot be compelled to pay the £100. according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that Piggott's Case only shows to what time the issue relates; but it goes further, and shows that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the court will inquire to what time the issue relates in both cases. Then to what time does the issue relate here? The plaintiffs in this case undertook to prove everything that would support the assumpsit in law, otherwise the assumpsit did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused; but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay

another instrument; and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar.

It was contended at the bar that the inquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance; but granting that he did so promise, that alone will not make him liable, unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my Lord on the case in Molloy; but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this court. It only appears that there was a point made at nisi prius, but not that it was afterwards argued here. But it has been said that a decision in favor of the plaintiffs will be the most convenient one for the commercial world; but that is much to be doubted, for if, after an alteration of this kind, it be competent to the court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange to prevent any attempts to alter them may be attended with many good effects, and cannot be productive of any bad consequences, because the party, who has paid a value for the bill, may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

PER CURIAM. Judgment for the defendant.[19]

DRUM v. DRUM.

(Supreme Judicial Court of Massachusetts, Barnstable, 1882. 133 Mass. 566.)

Contract upon a promissory note for $100, dated October 19, 1869, payable on demand to the plaintiff, or order, signed by the defendant, and witnessed. Writ dated September 28, 1878. Trial in the superior court, before Brigham, C. J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered the note in evidence; and the signatures of the defendant and of the attesting witness were proved. It appeared

[19] Affirmed in Exchequer Chamber, 2 H. Bl. 140 (1793).

that the note, after its delivery to the plaintiff, who could neither read nor write, had been changed in the following respects: The figures "$100" had been made to read "$136," or "$156;" the word "dollars" had been made to read "fifty," or "thirty," the word "six" being interpolated thereafter; and the word "on" changed to "dollars," and another word "on" interpolated before the word "demand."

The plaintiff testified that he knew nothing about the erasures and changes above described, and neither made them himself, nor directly or indirectly authorized the same to be made; and the agent of the plaintiff, in whose possession the note was left for a time, testified the same as the plaintiff, as to her knowledge of, and relation to, said erasures and changes.

The defendant objected that the plaintiff was not entitled to recover upon the note, unless he first explained and accounted for said changes and erasures; and that there was a variance between the plaintiff's allegations and the proofs.

The plaintiff asked the judge to instruct the jury as follows: "If the jury believe that said $100 note was altered without the knowledge or consent of the plaintiff, and without his agency, directly or indirectly, it is not, in law, an alteration, but a mutilation or spoliation; and the note would be good for, and according to, its original tenor."

The judge declined to give this instruction; but instructed the jury as follows: "The note of $100, appearing to be materially altered, is void, unless the plaintiff proves that it was altered by consent of the defendant, or proves the circumstances of its alteration as well as that he did not make or procure it. The alteration would not be sufficiently explained by proof that the plaintiff did not make, direct or procure it."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

Colburn, J. The note declared on in this case was for $100, signed by the defendant, and payable to the plaintiff, or order. Upon the production of the note, it appeared to have been changed from a note for $100 to a note for $136, or $156, in the manner stated in the exceptions.

It was proved at the trial that this note was originally a valid note for $100, and it was not pretended that it had ever been changed with the knowledge or consent of the defendant. The note was not indorsed, and, so far as appears, had always been owned by the plaintiff, and in his possession or in that of his agent.

These changes, under the circumstances, rendered the note prima facie void, and the burden was upon the plaintiff to explain them. If the changes had been made by the plaintiff, or by his authority or consent, directly or indirectly, the note was absolutely void. Adams v. Frye, 3 Metc. 103; Fay v. Smith, 1 Allen, 477, 79 Am. Dec. 752; 1 Greenl. Ev. § 564. But if the changes had been made by a stranger, without the knowledge or consent of the plaintiff, directly or in-

directly, the note remained a valid note, according to its original tenor. Adams v. Frye, ubi supra; 1 Greenl. Ev. § 566.

If the plaintiff proved that the note had never rightfully, or to his knowledge, been in the possession of any one but himself and his agent, and that the alterations were not made by him or his agent, or with the knowledge or consent, directly or indirectly, of either of them, he was entitled to recover on the note as originally written, though he might not be able to prove the circumstances of its alteration; and there was evidence tending to show that these were the facts in this case.

We are of opinion that the judge erred in instructing the jury, as he apparently did, in effect, that proof of the state of facts above supposed would not entitle the plaintiff to recover. Of course, we express no opinion as to the credibility of the evidence at the trial, or the probability that such changes as were made in the note would have been made by a stranger. These are considerations for the jury.

If, as we infer from the exceptions, the tenor of the note as originally written was apparent upon inspection of the note, it was sufficient to declare upon it in the usual way; and, upon showing that the changes in the note were mere spoliations, there would be no variance between the allegation and proof.

Exceptions sustained.

JEFFREY et al. v. ROSENFELD.

(Supreme Judicial Court of Massachusetts, Middlesex, 1901. 179 Mass. 506, 61 N. E. 49.)

MORTON, J. This is a bill in equity to restrain the foreclosure of a mortgage, on the ground that, after the delivery of the mortgage and note, there was a material alteration of the note without the plaintiffs' assent. The nature of the alteration, or by whom it was made, is not set out, nor is it alleged that the alteration was fraudulent. There was a demurrer for want of equity, and on the grounds that the bill did not state a case that entitled the plaintiffs to relief, and that they had an adequate remedy at law. The demurrer was sustained, and the bill dismissed, and the plaintiffs appealed.

The defendant contends that the nature of the alleged alteration should have been specifically set forth. St. 1898, c. 533, § 125 (the negotiable instruments act), provides what alterations shall be deemed material, and it would seem, for that and other reasons, that, as matter of correct pleading, the bill should have described the alteration relied on, in order that the court might see whether, as matter of law, the alteration was a material alteration. But for the purposes of this case, we assume in favor of the plaintiffs, without deciding, that this defect, if relied on as a ground of demurrer, should have been particularly pointed out, and that it is not open to the defendant, when the

cause of demurrer assigned is the general one of a want of equity, or that the bill does not state a case which entitles the plaintiffs to relief.

The question which has been chiefly argued relates to the effect of the alteration of the note upon the mortgage. The bill alleges that the mortgage was given to secure the payment of the note, but, for aught that appears, the transaction was the ordinary one of a loan of money secured by a note and mortgage. At any rate, there is nothing to show that the note and mortgage were not both given upon the same consideration, and to secure the same debt, and there is no allegation that the debt has been paid or satisfied in any way. If the mortgage was given to secure the personal obligation created by the note, and nothing more, the allegations of the bill should have been more specific.

There is no doubt that the effect of a material alteration of a note has been held to be different in some respects in England from what it has been held to be in this country. Thus it has been held there that a material alteration, even by a stranger, without the knowledge or assent of any of the parties to the note, will avoid it. Davidson v. Cooper, 11 Mees. & W. 778; Id., 13 Mees. & W. 343. And very likely it would be held under the bills of exchange act that the effect of such an alteration, by whomsoever made, would be to avoid the note as to all parties except those consenting to it and subsequent indorsers. Chalmers' Bills of Exchange (5th Ed.) 213, 214. But the law has been laid down differently in this commonwealth (Drum v. Drum, 133 Mass. 566); and, according to the weight of authority in this country, a material alteration of a note by a stranger, or a spoliation of it, as it is termed, will not avoid the note (Drum v. Drum, ubi supra; 2 Dan. Neg. Inst. [3d Ed.] § 1373a; 2 Pars. Notes & Bills [1st Ed.] 574; Norton, Bills & Notes [2d Ed.] 234, 235; 1 Ames, Cases on Bills & Notes, 449).

Whether, therefore, section 124 of the negotiable instruments act (St. 1898, c. 533), which is copied from section 64 of the bills of exchange act (St. 45 & 46 Vict. c. 61), should receive the same construction which that has received, or which it undoubtedly will receive, deserves serious consideration. The statute enacted in this state is the same, in substance and effect, as that adopted by the conference of commissioners on uniformity of laws which met at Detroit in 1895, and has already been enacted in 15 states (14 Harvard Law Rev. 241, Dec. 1900, by Prof. Ames); and although it is largely copied from the English act, and is in many of its provisions an almost, if not quite, verbatim copy of that act, it would seem not unreasonable to suppose that it was the intention of the framers of the American act that section 124 should be construed according to the law of this country, rather than that of England. But it is not necessary to pass upon that question now. In England, as in this country, except when an alteration is fraudulent, it does not cancel or extinguish the debt for which the note was given. Sutton v. Toomer, 7 Barn. & C. 416; Atkinson v. Hawdon, 2 Adol. & E. 628; Byles on Bills (4th Am. Ed.) 257; 2 Am.

& Eng. Encyc. of Law (2d Ed.) 200, 202; 2 Dan. Neg. Inst. (3d Ed.) §§ 1410a, 1411; 2 Pars. Notes & Bills (1st Ed.) 571, 572.

And the cases are numerous in which it has been held that a party could recover upon the original consideration, notwithstanding there had been a material alteration of the written contract. Lee v. Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Nickerson v. Swett, 135 Mass. 514; Adams v. Frye, 3 Metc. 103; Smith v. Dunham, 8 Pick. 246; Milbery v. Storer, 75 Me. 69, 46 Am. Rep. 361; Croswell v. Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; Keene v. Weeks, 19 R. I. 309, 33 Atl. 446.

Following out this principle, it has been held in many cases that the material alteration of a mortgage note, if not fraudulent, will not avoid the mortgage. Elliott v. Blair, 47 Ill. 342; Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; Clough v. Seay, 49 Iowa, 111; Gillette v. Smith, 18 Hun, 10; Cheek v. Nall, 112 N. C. 370, 17 S. E. 80; Heath v. Blake, 28 S. C. 406, 416, 5 S. E. 842; 2 Am. & Eng. Encyc. of Law (2d Ed.) 202; 2 Jones, Mortgages (3d Ed.) § 1215.

It is true that in this state it is held, contrary to what is the law in most of the states and in England, that a negotiable note is prima facie payment of the debt for which it is given. But the rule is not an unqualified one. Curtis v. Hubbard, 9 Metc. 322. Thus when a note is avoided by the maker for illegality or fraud, the promisor may recover the original consideration in an action for money lent or money had and received (Bank v. Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447; Walker v. Mayo, 143 Mass. 42, 8 N. E. 873); and the presumption of payment is rebutted when the effect will be to deprive a party of security which he has taken for the payment of the debt for which the note was given (Curtis v. Hubbard, ubi supra; Davis v. Parsons, 157 Mass. 584, 32 N. E. 1117).

This being the state of the law at the time of the passage of the negotiable instruments act, we should hesitate to say that the effect of section 124 is not only to avoid the note in case of a material alteration, but to cancel the debt for which it was given, and to deprive a party of the benefit of any security that he may have taken.

But it is not necessary to go so far. This is a suit on the equity side of the court. As already observed, there is no allegation of fraud in the bill, or of fault on the part of the mortgagee. For aught that appears, the alteration in the note may have been made by a stranger, or may have been innocently made by the holder, for the purpose of rectifying what he supposed to be a mistake, occurring under such circumstances that he would be entitled in equity to a reformation of the note and mortgage. There is no allegation that the note or the debt which the mortgage was given to secure has been paid, and there is no tender of payment.

The mortgage is a separate instrument from the note. At law and in equity the holder can enforce his remedy upon the mortgage independently of or concurrently with that on the note, and in some cases,

at least, where he had lost his remedy upon the note. Thayer v. Mann, 19 Pick. 535; 2 Jones, Mortgages (3d Ed.) § 1215 et seq. Under the circumstances, there being no allegation of payment and no offer of payment in the bill, we think that the bill does not state a case which entitles the plaintiff to relief, and that the demurrer was rightly sustained, and the bill rightly dismissed.

Decree affirmed.

NATIONAL EXCH. BANK OF ALBANY v. LESTER.

(Court of Appeals of New York, 1909. 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402.)

Appeal from the judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 16, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The defendant was sued as the accommodation indorser upon a note for $375 made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of its business. The defense was that the note as originally made and indorsed was for $75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "three hundred" immediately in front of the words "seventy-five" and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for $375 instead of $75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank. The answer prayed judgment that the complaint be dismissed except as to the amount of the note before alteration, together with interest and protest fees, to wit, $78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount.

Upon the trial the court charged the jury that, if the note indorsed by the defendant was in fact a note for $375 on its face, the plaintiff was entitled to recover that amount and interest. The trial judge further charged the jury that if they found that there were spaces upon the note "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure 3 and the words 'three hundred' so as not to occasion in the mind of the indorser [evidently meaning indorsee] any inquiry into its validity," they might find that the indorser conducted himself carelessly and negligently in the premises, and thus invited the liability which the face of the note called for when presented to the bank.

The defendant duly excepted to that part of the charge to the effect that, if the defendant was negligent in leaving blank spaces, the jury must find a verdict for the plaintiff for the full amount of the note as it stood. The court then reiterated the proposition, saying that,

"if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note;" and to this the defendant also excepted.

The jury found for the plaintiff in the sum of $375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division.

Willard Bartlett, J. As this case went to the jury, they might well have found that the note in suit was a note for only $75 when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for $375 when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for $75 into a note for $375. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value"; and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska, and Pennsylvania. In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein is placed upon the doctrine of negligence or estoppel by negligence.

The cases cited by respondent in which parties to commercial paper executed by them while obvious blanks remained unfilled thereon have been held liable upon the instrument as completed by filling out such blanks, on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are Winter & Loeb v. Pool, 104 Ala. 580, 16 South. 543; Statton v. Stone, 15 Colo. App. 237, 61 Pac. 481; Cason v. Grant Co. Deposit Bank, 97 Ky. 487, 31 S. W. 40, 53 Am. St. Rep. 418; Weidman v. Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603. There were obvious blanks also in the notes under consideration in Visher v. Webster, 8 Cal. 109, and Lowden v. S. C. Nat. Bank, 38 Kan. 533, 16 Pac. 748, and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

It must frankly be conceded, however, that the respondent finds support for the doctrine which it asserts in the case at bar in the decisions of Pennsylvania, Illinois, and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. Garrard v. Haddan, 67 Pa. 82, 5 Am. Rep. 412; Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120; Scotland Co. Nat. Bank v. O'Connel, 23 Mo. App. 165; Hackett v. First Nat. Bank of Louisville, 114 Ky. 193, 70 S. W. 664; Isnard v. Torres & Marquez, 10 La. Ann. 103.

In Garrard v. Haddan, supra, a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been inserted after the maker had signed and delivered it; and the court held the maker answerable to a bona fide holder for the full face of the note as altered on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution. "We think this rule is necessary," said Chief Justice Thompson, "to facilitate the circulation of commercial paper, and at the same time increase the care of drawers and acceptors of such paper and also of bankers, brokers, and others in taking it." It is a little difficult to see how the rule tends to make bona fide purchasers more careful, as this last observation suggests.

The case of Yocum v. Smith, supra, held the maker liable upon a note which had been raised after execution from $100 to $120; the words "and twenty" having been inserted in a space left between the word "hundred" and the word "dollars." The court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he had thus placed it in the power of another to do an injury; and that he must, therefore, suffer the resulting loss. This decision undoubtedly sustains the position of the respondent, although there was another element of negligence in that case which is not present here. It appeared that

the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount; yet he made no objection as to the amount until nearly a year later.

In Scotland Co. Nat. Bank v. O'Connel, supra, the defendants executed and delivered a note for $100 to one Smith, the body of which was in his handwriting, in a condition which enabled him to add the words "thirty-five" after "one hundred" in the written part and put the figures "$135" at the head of the note in the space where the amount is usually indicated by figures. The St. Louis Court of Appeals held that the defendants were liable for $135 because they had delivered the note to Smith, who was their co-maker, "in such a condition as to enable him to fill blank spaces without in any manner changing the appearance of the note as a genuine instrument."

The cases thus far discussed were all of them actions against the makers of the raised paper. The same rule, however, was applied against an indorser in Isnard v. Torres & Marquez, supra, by the Supreme Court of Louisiana under the following circumstances: Marquez indorsed a note for $150 for the accommodation of Torres. The amount was raised to $1,150, and purchased by the plaintiff in good faith as a note for that sum. The report states that there was testimony of experienced persons to the effect that, if at the time of the indorsement the word "onze" (for eleven, the note being in French) and the additional figure before 150 were not there, "the note would have exhibited blanks which at least with regard to the written part were unusual and calculated to attract attention, and would have rendered the note unsalable in the market." In this opinion, upon inspection of the note, the court expressed its full concurrence. The indorser was held liable for the amount of the note as raised on the ground that he had not exercised proper caution. To the same effect is Hackett v. First Nat. Bank of Louisville, supra, where it was held that a surety who had signed a note in which were written the words "five hundred" with spaces before and after them, which the maker had filled up by writing "twenty" before and "fifty" after them, thereby making a note for $2,550, was liable thereon to a purchaser in good faith. In this case the attention of the Kentucky Court of Appeals was called to the fact that the great weight of authority was the other way, but, in view of the fact that the rule had been so established in Kentucky for a quarter of a century, the court determined to adhere to it, in observance of the principle of stare decisis.

This court is not thus constrained. The question involved in the present appeal has not been authoritatively decided in this state, and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well-considered adjudications in other jurisdictions.

The outcome of these adjudications is accurately set forth, as it

seems to me, by Mr. Randolph in his treatise on the Law of Commercial Paper, as follows: "Where negotiable paper has been executed with the amount blank, it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written. It has now, however, become in America an established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention * * * will constitute a material alteration, and operate to discharge the maker." 1 Randolph on Commercial Paper, § 187.

The rule thus stated is sustained by the decisions of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas, and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine, and accords better with such adjudications of this court as bear more or less directly on the question involved.

The leading case sustaining this view is Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, in which the opinion was written by Chief Justice Gray, afterward an Associate Justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877), including that of the Supreme Court of Pennsylvania in Garrard v. Haddan, supra, which was the principal authority the other way. I shall not undertake to review the same authorities here or paraphrase the opinion of Chief Justice Gray which deals with them in such a manner as fully to justify his rejection of the doctrine that the makers of a promissory note apparently complete when they sign it are liable for an amount to which it may subsequently be raised, without their knowledge or consent, on the ground that they were negligent in permitting spaces to remain thereon in which the figures and words which affected the increase could be inserted. In support of his conclusion, however, he quotes some passages from the opinion of Christancy, J., in Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661, which will bear repetition as suggestive of some of the reasons why the forgery of a promissory note should not be held to create a contract, which the party sought to be charged never consciously made himself or authorized anybody else to make in his behalf. Speaking of the alleged negligence in leaving spaces on the note, Mr. Justice Christancy said: "The negligence, if such it can be called, is of the same kind as might be claimed if any man in signing a contract were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest

of the instrument. * * * Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and, unless perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders."

While a general reference to the cases cited and reviewed by Chief Justice Gray in Greenfield Savings Bank v. Stowell, supra, will suffice, there are some later decisions to which attention may be called. In Knoxville Nat. Bank v. Clark, 51 Iowa, 264, 1 N. W. 491, 33 Am. Rep. 129, will be found a strong and well-reasoned opinion against holding a party to a note which has been fraudulently raised, after it left his hands, liable for negligence, because when he executed the instrument there were spaces left thereon (not being obvious blanks designed to be filled) which would permit of forgery. The trial court had rendered judgment against the maker for the amount of the note as raised from $10 to $110 on a finding of negligence in leaving a space before the word "ten" and the figures "10." "On this ground," said the Supreme Court of Iowa, "the court proceeded and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against the thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle, or is practicable, if he is required to protect and guard his business transactions so that he cannot be held liable for the criminal acts of another? If so, why should not the negligence of the owner of goods which are stolen excuse the bona fide purchaser?" And, referring to the argument that such a measure of liability is required to promote the free interchange of commercial paper (a view which seems to have been influential in the Pennsylvania case of Garrard v. Haddan), the court well said: "At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made and which it is proposed to fasten on him because some one has committed a forgery or other crime."

In Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371, the Maryland Court of Appeals emphasizes the distinction between a note in blank as to the amount, when signed

and delivered to another for use, and a note complete on its face when signed and delivered, in which has been written the sum payable, the date, time of payment, and name of the payee. "In such case," it is held, "there can be no inference that the defendant authorized any one to increase the amount simply because blank spaces were left in which there was room enough to insert a larger sum."

No one questions the proposition that, where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount, such party is liable to a bona fide holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. Van Duzer v. Howe, 21 N. Y. 531. So, also, a note executed with a blank therein for a statement of the place of payment is not avoided in the hands of a bona fide holder for value by the insertion in the blank of a place different from that agreed upon by the original parties. Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573. But, where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372. In the case last cited the note, when indorsed, ended with the word "at," followed by a space in which the maker, after indorsement, inserted a place of payment, adding the words "with interest"; but no suggestion appears to have been made that, because the space left was large enough to allow the insertion of these words, the indorser was negligent and could be charged with the amount of the note, including the interest, on that ground. On the contrary, as the law then stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the negotiable instruments law (Laws 1897, p. 745, c. 612, § 205) he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement by means of a forgery, is liable upon the instrument in the hands of a bona fide holder for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence; for the action is not in tort for damages, but upon the contract as expressed in the note. But, apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed, and upon what seems to me to be considerations of sound reason independent of judicial authority.

An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects—as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument; in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross-lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business.

That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true, and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. See Bradish v. Bliss, 35 Vt. 326. As was said by Judge Cullen in Critten v. Chemical Nat. Bank, 171 N. Y. 219, 224, 63 N. E. 969, 57 L. R. A. 529, it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.[20]

[20] Accord: Scholfield v. Londesborough, [1896] A. C. 514; Imperial Bank v. Bank, [1903] A. C. 49; Colonial Bank v. Marshall, [1906] A. C. 559. A fortiori, where there are no blank spaces in the instrument, a holder in due course under section 124, Neg. Inst. Law, may enforce the instrument according to its original tenor. Massachusetts Bank v. Snow, 187 Mass. 159, 72 N. E. 959 (1905); Colonial Bank v. Duer, 108 App. Div. 215, 95 N. Y. Supp. 810 (1905); Hetch v. Shenners, 126 Wis. 27, 105 N. W. 309 (1905), semble; Schwartz v. Wilmer, 90 Md. 136, 44 Atl. 1059 (1899), semble. See Bothell v. Schweitzer, 84 Neb. 271, 120 N. W. 1129, 22 L. R. A. (N. S.) 263 (1909).

APPENDIX

THE NEGOTIABLE INSTRUMENTS LAW

A GENERAL ACT RELATING TO NEGOTIABLE INSTRUMENTS (BEING AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES ON THAT SUBJECT)[1]

TITLE I.—NEGOTIABLE INSTRUMENTS IN GENERAL

Article I.—Form and Interpretation

Section 1. Be it enacted, etc., An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

Sec. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid—

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or

[1] Recommended by the Committee on Commercial Law of the Boards of Commissioners for promoting uniformity of legislation in the United States, and adopted (with amendments to a few sections) in the following states and territories: Alabama (1907); Arizona (1901); Colorado (1897); Connecticut (1897); District of Columbia (1899); Florida (1897); Hawaii (1907); Idaho (1903); Illinois (1907); Iowa (1902); Kansas (1905); Kentucky (1904); Louisiana (1904); Maryland (1898); Massachusetts (1898); Michigan (1905); Missouri (1905); Montana (1903); Nebraska (1905); Nevada (1907); New Hampshire (1909); New Jersey (1902); New Mexico (1907); New York (1897); North Carolina (1899); North Dakota (1899); Ohio (1902); Oklahoma (1909); Oregon (1899); Pennsylvania (1901); Rhode Island (1899); Tennessee (1899); Utah (1899); Virginia (1897-8); Washington (1899); West Virginia (1907); Wisconsin (1899); Wyoming (1905).

4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Sec. 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

Sec. 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Sec. 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Sec. 6. The validity and negotiable character of an instrument are not affected by the fact that—

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Sec. 7. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

Sec. 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of—

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

Sec. 9. The instrument is payable to bearer—

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

Sec. 10. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Sec. 11. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

Sec. 12. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Sec. 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in

due course; but as to him, the date so inserted is to be regarded as the true date.

Sec. 14. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Sec. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Sec. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Sec. 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;
7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Sec. 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Sec. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Sec. 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Sec. 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Sec. 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

Sec. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Article II.—Consideration

Sec. 24. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Sec. 25. Value is any consideration sufficient to support a simple

contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Sec. 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Sec. 28. Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

Sec. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Article III.—Negotiation

Sec. 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Sec. 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Sec. 32. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Sec. 33. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

Sec. 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

Sec. 35. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Sec. 36. An indorsement is restrictive, which either—

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Sec. 37. A restrictive indorsement confers upon the indorsee the right—

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Sec. 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

Sec. 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Sec. 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Sec. 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Sec. 42. Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Sec. 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Sec. 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Sec. 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

Sec. 46. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Sec. 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Sec. 48. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Sec. 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Sec. 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Article IV.—Rights of the Holder

Sec. 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Sec. 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Sec. 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instru-

ment, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Sec. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Sec. 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Article V.—Liabilities of Parties

Sec. 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

Sec. 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Sec. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

Sec. 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser,

unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Sec. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Sec. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

Sec. 66. Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Sec. 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Sec. 68. As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

Sec. 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section

sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

Article VI.—Presentment for Payment

Sec. 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Sec. 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Sec. 72. Presentment for payment. to be sufficient, must be made—

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Sec. 73. Presentment for payment is made at the proper place—

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Sec. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Sec. 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Sec. 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be found.

Sec. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Sec. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Sec. 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Sec. 80. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

Sec. 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Sec. 82. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

Sec. 83. The instrument is dishonored by non-payment when,—

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

Sec. 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

Sec. 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

Sec. 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time

of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Sec. 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Sec. 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Article VII.—Notice of Dishonor

Sec. 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Sec. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.

Sec. 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Sec. 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Sec. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Sec. 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

Sec. 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Sec. 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Sec. 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Sec. 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Sec. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

Sec. 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Sec. 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Sec. 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Sec. 103. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Sec. 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Sec. 105. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Sec. 106. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

Sec. 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Sec. 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Sec. 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Sec. 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Sec. 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

Sec. 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Sec. 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Sec. 114. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. When the drawee is a fictitious person or a person not having capacity to contract;
3. When the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

Sec. 115. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

Sec. 116. Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Sec. 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Sec. 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

Article VIII.—Discharge of Negotiable Instruments

Sec. 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Sec. 120. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

Sec. 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is re-

mitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Sec. 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Sec. 123. A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Sec. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Sec. 125. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

TITLE II.—BILLS OF EXCHANGE

Article I.—Form and Interpretation

Sec. 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at

a fixed or determinable future time a sum certain in money to order or to bearer.

Sec. 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Sec. 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Sec. 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Sec. 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Sec. 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

Article II.—Acceptance

Sec. 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Sec. 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.

Sec. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Sec. 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Sec. 136. The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Sec. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after

such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

Sec. 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Sec. 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Sec. 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

Sec. 141. An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

Sec. 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

Article III.—Presentment for Acceptance

Sec. 143. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Sec. 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.

Sec. 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;
2. Where the drawee is dead, presentment may be made to his personal representative;
3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Sec. 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

Sec. 147. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

Sec. 148. Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.
2. Where, after the exercise of reasonable diligence, presentment cannot be made.
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

Sec. 149. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused, and the bill is not accepted.

Sec. 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Sec. 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

Article IV.—Protest

Sec. 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Sec. 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify—

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Sec. 154. Protest may be made by—

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Sec. 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Sec. 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Sec. 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, be-

fore the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Sec. 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Sec. 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Article V.—Acceptance for Honor

Sec. 161. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Sec. 162. An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Sec. 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Sec. 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 165. The acceptor for honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

Sec. 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Sec. 167. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Sec. 168. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

Sec. 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

Article VI.—Payment for Honor

Sec. 171. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Sec. 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

Sec. 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Sec. 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Sec. 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Sec. 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Sec. 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

Article VII.—Bills in a Set

Sec. 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Sec. 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Sec. 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

Sec. 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

Sec. 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Sec. 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

TITLE III.—PROMISSORY NOTES AND CHECKS

ARTICLE I

Sec. 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

Sec. 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Sec. 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Sec. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

Sec. 188. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Sec. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

TITLE IV.—GENERAL PROVISIONS

Article I

Sec. 190. This act shall be known as the Negotiable Instruments Law.

Sec. 191. In this act, unless the context otherwise requires—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

Sec. 192. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

Sec. 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Sec. 194. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Sec. 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Sec. 196. In any case not provided for in this act the rules of the law merchant shall govern.

Sec. 197. Of the laws enumerated in the schedules hereto annexed that portion specified in the last column is repealed.

Sec. 198. This chapter shall take effect on

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